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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

ANNETTE L. GERHARDT, AS
GUARDIAN AD LITEM FOR
HEATHER JO KRUEGER,
Petitioner,

v.

ESTATE OF ARLEN LEE MOORE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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QUESTION PRESENTED

Is a child denied equal protection of the laws and due process of law by a state court decision that bars her from seeking ongoing support from her natural father because her mother entered into a lump-sum child support settlement pursuant to a state statute that permitted such settlements only if the child is illegitimate?

PARTIES TO THE PROCEEDING IN THE WISCONSIN SUPREME COURT

The caption contains the names of all parties in the Wisconsin Supreme Court.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin is reported as *Gerhardt v. Moore*, 139 Wis. 2d 833, 407 N.W.2d 895 (1987) and is printed as Appendix A (App. 1a *et seq.*) hereto.[1] The case was certified to the Supreme Court of Wisconsin by the Court of Appeals of Wisconsin, whose unreported opinion is printed as Appendix B hereto (App. 12a *et seq.*). The unreported opinion of the Circuit Court for Sauk County, Wisconsin is Appendix C hereto (App. 17a *et seq.*).

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[1] "App." refers to the Appendix at the back of this petition.

JURISDICTION

The Wisconsin Supreme Court's judgment was entered on June 26, 1987. (App. 1a) A timely motion for reconsideration was denied on August 18, 1987. (App. 25a) By order of Justice John Paul Stevens, as Circuit Justice for the Seventh Circuit, petitioner was granted an extension of time to file this petition to and including December 31, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) (1982).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS
FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

WISCONSIN STATUTES § 52.28 (1967)

A woman who has borne a child out of wedlock or who is pregnant with a child which is likely to be born, out of wedlock, may enter into an agreement with the person claimed by her to be the father of the child. Such agreement may be entered into at any time prior to final judgment, either before or after issuance of process, or at any time while said judgment is still in effect. * * * The agreement shall include a determination of all facts and orders which § 52.37 requires the court to determine in its order for judgment, except that where the parties are unable to agree as to the paternity of the child, the alleged father may deny paternity in the agreement. By the terms of the agreement the defendant must submit personally to the jurisdiction of the court, and consent to entry of judgment in accordance with the

terms of the agreement. Upon motion of the district attorney, the judge of a court of record having power to enter final judgment in paternity proceedings, being satisfied with the terms of the agreement, shall order judgment in accordance therewith if paternity of the child is admitted. Where the paternity of the child is not admitted, after said agreement is approved by the court, it shall be filed but judgment shall not be rendered until there is a default of the payments agreed upon, when, upon motion of the district attorney, judgment shall be rendered and entered forthwith. All agreements referred to in §§ 52.21 to 52.45 shall be drawn by the district attorney. No other agreement or settlement of any paternity proceeding shall be valid.

STATEMENT OF THE CASE

Heather Jo Krueger was born out of wedlock on September 7, 1969. (App. 2a) Under Wisconsin law at that time and at all times to the present, parents have an obligation to maintain dependent children, so far as they are able. *See* Wis. Stat. § 52.01 (1967); Wis. Stat. § 767.25 (1981 & West Supp. 1987). At the time Heather Jo was born, county district attorneys were empowered to apply to the county courts for an order to compel such maintenance. Wis. Stat. § 52.01 (1967). Within months of Heather Jo's birth, the State of Wisconsin, through the District Attorney's Office for Dane County, Wisconsin, filed a complaint by Betty Lou Krueger, Heather Jo's mother, as complainant, seeking support from Arlen Lee Moore, Heather Jo's father. (App. 2a-3a)

Under Wisconsin law, a child support order was to "specify a sum which will be sufficient for the support of [the child], to be paid weekly or monthly, during a period fixed therein, or until the further order of the court." Wis. Stat. § 52.01(4) (1967). The Wisconsin statutes explicitly provided that such an order could be

modified: "Upon application of any party affected thereby and upon like notice and procedure, the court may modify such order." Wis. Stat. § 52.01(4) (1967).

Some Wisconsin statutes governing child support, however, applied only to children born out of wedlock. Section 52.28 of the Wisconsin Statutes provided that a woman who has borne a child out of wedlock may enter into an agreement to settle a paternity claim with the person claimed by her to be the father of the child. All agreements were required to be drawn by the district attorney, and the district attorney even was empowered to make an agreement "with the putative father * * * with the same force and effect as might be made by the mother" where the mother had been delivered of a child born out of wedlock who is likely to become a public charge. Wis. Stat. §§ 52.28, 52.29 (1967). No other agreement or settlement of any paternity proceeding, including any lump-sum settlement of a legitimate child's claim for child support, was valid under Wisconsin law. Wis. Stat. § 52.28 (1967).

In February 1970, when Heather Jo was just over six months old, an assistant district attorney for Dane County drew a settlement agreement by which Arlen Lee Moore admitted paternity, which he was not required to do under section 52.28. (App. 27a) Moore also agreed to pay Betty Lou Krueger $75 per month for 48 months for a total child support settlement of $3,600. (App. 27a) Moore further agreed to pay $1,000 to Sauk County, Wisconsin, for the lying-in expenses resulting from Heather Jo's birth. (App. 27a) The amount to be paid to Sauk County thus represented more than 25 per cent of the total support settlement to be paid to Betty Lou Krueger.

The agreement was approved by the Sauk County Corporation Counsel and a County Court Judge for Dane County. (App. 28a) No *guardian ad litem* was appointed or appeared on behalf of Heather Jo. (App. 3a)

Heather Jo's father made the payments required by the agreement, but provided no other funds for her support. (App. 3a-4a)

In 1979, the Wisconsin legislature repealed section 52.28 as part of a major revision of statutes governing actions affecting the family. The revised statutes became effective in 1981. In 1984, when Heather Jo was 15 years old, she filed a petition pursuant to those statutes with the Wisconsin Circuit Court for Sauk County for appointment of a *guardian ad litem* to pursue a claim against her father for her past, present and future support. (App. 29a) The court appointed Annette L. Gerhardt, an attorney, to act as Heather Jo's *guardian ad litem.* (App. 29a) Petitioner Gerhardt filed a Petition to Compel Support in November, 1984, alleging that Arlen Lee Moore is the natural father of Heather Jo Krueger and that he had not paid any amount for her support since November 1, 1974. (App. 30a-31a) Gerhardt sought an order requiring Moore to pay 17 per cent of his gross income for the past, present and future support of Heather Jo, to provide hospitalization and medical health insurance for her benefit and to pay 50 per cent of her uninsured medical expenses, and to maintain an appropriate policy of life insurance with Heather Jo as the irrevocable primary beneficiary. (App. 31a) On the date of the petition, the court entered an order requiring Moore to appear and show cause why a temporary support order should not be entered pending judgment and requiring Moore to provide financial information. (App. 32a-33a)

The petitioner filed financial information, in response to the same order. The filing showed that Betty Lou Krueger was supporting Heather Jo on a net monthly income of $756.55, with monthly expenses that exceeded that amount. (App. 36a) She also had debts for a car loan, medical expenses, and home improvements of over $5,000. (App. 37a)

Moore responded to the motion to compel support with an answer and motion to dismiss. (App. 4a) He argued that he reached a lump-sum settlement with Heather Jo and her mother, although the agreement named only Betty Lou Krueger, not Heather Jo, as a party along with Moore. (App. 4a) Moore claimed that the lump-sum settlement terminated his obligation to provide child support and that the doctrine of res judicata dictates that no further action could be taken to compel support. (App. 4a) The Circuit Court for Sauk County agreed and dismissed the complaint. (App. 23a) The court conceded that under current Wisconsin law, section 767.45, "Heather Jo has a right to bring this action of support against her father."[2] (App. 19a) The court concluded, however, that "[t]he concept of res judicata has long been a kingpin of Anglo Saxon law" and that Moore, "having fully complied with the law as it existed at the time the agreement was entered into, cannot now be sued by the child for yet more support." (App. 20a) Moore had provided no financial information and petitioner Gerhardt had been given no opportunity to make a record concerning the needs of the child or how the mother and child's financial circumstances had changed over the nearly 15 years since the lump-sum settlement was reached.

Petitioner Gerhardt appealed to the State of Wisconsin Court of Appeals for District IV. She argued that barring Heather Jo's right to claim child support on res judicata grounds, when she had not been represented in the prior proceedings, was improper under Wisconsin law and a violation of due process and equal protection because it denied Heather Jo a proceeding for child support

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[2] Section 767.45 provides in relevant part:

> (1) The following persons may bring an action for the purpose of determining the paternity of a child * * *:
>
> (a) The child.
>
> * * *

that is available to marital children.[3] The court of appeals concluded that the issues raised were "of statewide importance" and "could affect many other paternity settlements entered under the pre-1981 law." (App. 16a) It accordingly certified the case to the Wisconsin Supreme Court. (App. 16a)

The Supreme Court of Wisconsin affirmed the Circuit Court for Sauk County.[4] The court reviewed res judicata doctrine and held it applicable even though Heather Jo was not a party to the earlier proceeding. (App. 5a-10a) The court held that there is a relationship between Heather Jo and her mother such that Heather Jo was, in essence, represented. (App. 6a-7a) The court held that *whenever* a mother of a child born out of wedlock entered into a court-approved settlement with the father pursuant to Chapter 52, "the child's interests were virtually represented by the mother." (App. 7a) Although no factual record had been developed concerning the circumstances under which Betty Krueger signed the lump-sum settlement, the court concluded "that the custodial parent was best suited to understand and protect the needs of the child" and that "a custodial mother's interest and that of the child in a paternity proceeding are in many respects identical." (App. 7a) The court further took comfort in the participation of Sauk County in the settlement, and held that "the county's interest in the defendant father agreeing to provide the support, maintenance, and education of the child is parallel to that of the child," without regard for the fact that the county had a conflicting interest in recovering the mother's lying-in expenses. (App. 7a)

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[3] *Gerhardt v. Moore*, Appeal No. 85-0943, Brief of Appellant at 9-17 (July 29, 1985); (App. 15a).

[4] While the case was pending before the Supreme Court of Wisconsin, the Estate of Arlen Lee Moore was substituted as the defendant-respondent, upon Moore's death.

The Wisconsin Supreme Court rejected petitioner Gerhardt's equal protection claim in a single paragraph, without citation to this Court's cases regarding the constitutional protection afforded to illegitimates in actions for paternal support. (App. 11a) The court explained that the statutes under which the lump-sum settlement had been reached permitted settlements providing ongoing child support as an alternative to lump-sum settlements. (App. 11a) Since not all illegitimate children were barred from reopening child support awards, the court reasoned, the equal protection of the laws was not denied. (App. 11a) The court did not address the fact that *no* child of a marriage would be barred at the outset, as Heather Jo Krueger was barred, from seeking additional support.

REASONS FOR GRANTING THE PETITION

I. This Court Should Grant Certiorari Because the Wisconsin Supreme Court's Decision Giving Preclusive Effect to a Lump-Sum Settlement of a Father's Support Obligation that Could Be Entered Under Wisconsin Law Only Because the Child Is Illegitimate Is Contrary to Controlling Decisions of This Court on a Matter of Fundamental Importance.

A. *Barring Illegitimate Children from Seeking Child Support Because Their Mothers Entered into Lump-Sum Settlements that Were Permitted by Law Only for Illegitimate Children Violates the Equal Protection of the Laws Guaranteed by the Fourteenth Amendment.*

The long-settled statutory and common law of Wisconsin establishes that minor children born both in and out of wedlock[5] are owed an ongoing duty of support from their parents. *See In re the Paternity of R.W.L.*, 116 Wis. 2d 150, 157, 341 N.W.2d 682, 685 (1984); *Krause*

[5] For purposes of this Petition, the terms "born out of wedlock" and "illegitimate" are used interchangeably.

v. Krause, 58 Wis. 2d 499, 507, 206 N.W.2d 589, 594 (1973); *Niesen v. Niesen*, 38 Wis. 2d 599, 602, 157 N.W.2d 660, 662 (1968); *State v. Freiberg*, 35 Wis. 2d 480, 486, 151 N.W.2d 1, 4 (1967); *State v. Beilke*, 146 Wis. 515, 131 N.W. 891 (1911). Once a Wisconsin court has entered a settlement decree or order for the custody or support of a legitimate child of divorced or separated parents, the doctrine of res judicata will not bar reconsideration of that order or decree. *See, e.g., Krause*, 58 Wis. 2d at 508, 206 N.W.2d at 594; *Foregger v. Foregger*, 48 Wis. 2d 512, 522, 180 N.W.2d 578, 583 (1970); *King v. King*, 25 Wis. 2d 550, 553-54, 131 N.W.2d 357, 359-60 (1964). *See also* Wis. Stat. § 767.25(1m) (West Supp. 1987). Yet in this case, the Wisconsin Supreme Court cut off completely any opportunity for an illegitimate child to obtain a support decree solely because her mother entered into a lump-sum settlement pursuant to the now superseded section 52.28 of the Wisconsin Code. No legitimate child is barred in this manner. The Wisconsin Supreme Court's reading of section 52.28 is contrary to controlling decisions of this Court because it does not withstand the scrutiny this Court has afforded similar classifications based on illegitimacy that cut off access to procedures for obtaining child support.

The unanimous Court declared, in *Gomez v. Perez*, 409 U.S. 535, 538 (1973), that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally," and applied this principle directly to the right to obtain child support: "[O]nce a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother." *Id.*

Following *Gomez*, this Court expressly held that claim preclusion mechanisms similar to res judicata—short

statutes of limitations for paternity suits—cannot be used by states to bar illegitimate children permanently from obtaining support from their fathers where legitimate children are not similarly barred because such statutes are not substantially related to a legitimate state interest. *See Mills v. Habluetzel*, 456 U.S. 91 (1982); *Pickett v. Brown*, 462 U.S. 1 (1983). In *Mills*, the Court struck down a Texas law that imposed a one-year statute of limitations on paternity actions. The Court held that such state-imposed restrictions on the availability of a child support action to illegitimates must be substantially related to a legitimate state interest in order to survive scrutiny under the equal protection clause. *Mills*, 456 U.S. at 98-99. *Accord, Lalli v. Lalli*, 439 U.S. 259, 265 (1978). Under the Texas statute, failure to bring suit on behalf of illegitimate children within their first year of life resulted in their " 'being forever barred from the right to sue their natural father for child support, a limitation their legitimate counterparts do not share.' " *Mills*, 456 U.S. at 95 (quoting *In re Miller*, 605 S.W.2d 332, 334 (Tex. Civ. App. 1980)). The Court recognized that support suits brought by illegitimate children have the complication of requiring proof of paternity. *Mills*, 456 U.S. at 97-98. It explained that the need to prove paternity could justify some differences between the statutes governing support claims by legitimate and illegitimate children. *Id.* But the Court concluded that a one-year "window" in which to bring such claims created a support right for illegitimates that was merely illusory, and not supported by the state's interest in avoiding stale or fraudulent claims. *Id.* at 97. The Court declared that "[i]t would hardly satisfy the demands of equal protection and the holding of *Gomez* to remove an 'impenetrable barrier' to support, only to replace it with an opportunity so truncated that few could utilize it effectively." *Id.*

The Court reached the same result in *Pickett*, and struck down a two-year statute of limitations in Tennes-

see as a violation of equal protection. The Court again tested the statute by its substantial relationship to a legitimate state interest, and reasoned that a two-year statute of limitations was only a small improvement over a one-year limitation period. The Court concluded that the two-year statute also amounted to a restriction that effectively extinguished the support rights of illegitimate children. *Pickett*, 462 U.S. at 13.

The Wisconsin Supreme Court has used res judicata to "truncate" the right of illegitimate children in Wisconsin to support, like the state legislatures used the statutes of limitations in *Mills* and *Pickett*. Under the Wisconsin court's holding, there has never been a time since her mother's agreement, nor will a time ever come, when Heather Jo can seek the support she needs, despite the patent inadequacy of the original award to her mother.[6] The original lump sum is analogous to the short window for filing a paternity suit in *Mills* and *Pickett*; it presents a small, but inadequate, opportunity to obtain the support necessary for the child for years into the future. And, as in *Mills* and *Pickett*, no legitimate child is limited to such a truncated opportunity to seek support.

The Wisconsin Supreme Court's rationale for barring illegitimates whose mothers entered into settlements, even though legitimate children could not be so barred, was to protect the res judicata effect of the settlements. (App. 5a, 10a-11a) The primary purpose of res judicata is to preserve the finality of judgments and to avoid relitigation of claims that already have been adjudicated. *In re Estate of Radocay*, 30 Wis. 2d 671, 673, 142 N.W.2d 224, 226 (1966). The doctrine is not applied to child

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[6] *See In re the Paternity of B.W.S.*, 131 Wis. 2d 301, 314, 388 N.W.2d 615, 621 (1986), in which the Supreme Court of Wisconsin held, applying Michigan law, that a child support payment of $3,000 was inadequate as a matter of law. Betty Lou Krueger's settlement of $3,600 similarly fails to reflect an adequate and reasonable level of support from a father for the life of a child to adulthood.

support cases under Wisconsin law precisely because the rights of the child and the public's interest in the child's welfare are of higher priority. *See King v. King*, 25 Wis. 2d 550, 553, 131 N.W.2d 357, 359 (1964). In such cases, the Wisconsin courts have continuing jurisdiction, *id.*, and the controlling consideration is the welfare of the child. *See Krause*, 58 Wis. 2d at 513, 206 N.W.2d at 597.

Under the Court's precedents, preserving the finality of judgments in child support cases does not take precedence over the fundamental state interest in protecting the welfare of children and the equal protection of the laws to which illegitimate children are entitled.[7] Nor does the father's interest in repose outweigh the child's interest in an appropriate level of support. The Court has stated repeatedly that "problems [with respect to proof of paternity] are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination." *Gomez*, 409 U.S. at 538. *Accord*, *Mills*, 456 U.S. at 97; *Pickett*, 462 U.S. at 9. Here, res judicata was used as a bar to preclude any child whose mother entered into a lump-sum settlement from even attempting to prove paternity. This is a much more drastic bar than is justified by the difficulty of proof in paternity cases. In this case, the father actually admitted paternity in the lump-sum agreement, which was an admission not required by statute. In other cases, the difficulty of proof " 'is substan-

[7] The doctrine of res judicata acts as a claim preclusion mechanism; it brings issues to a final close. It is not a constitutional requirement, nor can it be applied mechanically to deny the equal protection required by the Constitution: "[R]es Judicata, as the embodiment of a public policy, must, at times, be weighed against competing interests, and must, on occasion, yield to other policies." *Spilker v. Hankin*, 188 F.2d 35, 39 (D.C. Cir. 1951). This Court has recognized that where sufficiently strong policy considerations —even short of constitutional protections—oppose the application of res judicata, the doctrine is not applicable. *E.g.*, *Kalb v. Feuerstein*, 308 U.S. 433 (1940).

tially alleviated by recent scientific developments in blood testing dramatically reducing the possibility that a defendant will be falsely accused of being the illegitimate child's father.' " *Pickett*, 462 U.S. at 11 (quoting *Mills*, 456 U.S. at 104 n.2 (O'Connor, J., concurring)). *See also Little v. Streater*, 452 U.S. 1, 6-8 (1981). This Court also observed in *Pickett* that the state's interest in preventing the problems surrounding proof of paternity, such as avoiding stale or fraudulent claims, is undermined by the " 'countervailing state interest in ensuring that genuine claims for child support are satisfied.' " *Pickett*, 462 U.S. at 10 (quoting *Mills*, 456 U.S. at 103 (O'Connor, J., concurring)). Satisfaction of child support claims is obviously beneficial for children, but also may reduce the number of individuals forced to seek welfare assistance. *Id.*

Moreover, the interest in repose and in avoiding stale or fraudulent claims is undercut by the fact that Heather Jo could have brought this action if the State of Wisconsin and her mother had never brought the original suit, or if the settlement or judgment in that suit had been for periodic payments, rather than a lump sum. (App. 11a) Yet proceedings after a lump-sum settlement are no more open to fraud than proceedings initiated for the first time years after a child's birth. It is difficult to see how the Wisconsin courts would be burdened by giving children like Heather Jo Krueger an opportunity to open child support claims and, if necessary, prove paternity.[8] Wisconsin courts routinely re-

[8] Wisconsin's current statutory procedure for litigating paternity claims is designed to be fair to all parties. The statutes provide for pretrial paternity proceedings, limit the type of evidence and testimony that may be offered, and allow for blood testing and expert witnesses as a method for proving paternity. *See* Wis. Stat. §§ 767.46, 767.47, 767.475, and 767.48 (1981 & West Supp. 1987). In addition to these Wisconsin procedures, federal legislation now permits the federal government to aid states in setting up procedures for establishing paternity. *See* 42 U.S.C. §§ 651-667 (1982 &

open child support judgments, even if based on a settlement agreement, for legitimate children under the current statutory scheme.[9] As in *Pickett*, the availability of a means to provide an appropriate level of paternal support for legitimate and illegitimate children whose mothers received child support awards or settlements calling for ongoing payments rather than lump-sum settlements is powerful evidence that the res judicata bar is not necessary to protect any state interest in preventing stale claims. *Pickett*, 462 U.S. at 14-15.

Petitioner seeks only the opportunity to obtain ongoing support that responds to the needs of the child involved.[10] That opportunity is available on a procedurally fair basis to all legitimate children in Wisconsin, but is denied totally to illegitimate children whose mothers accepted

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Supp. III 1985). To receive federal aid for enforcing state child support decrees, a State must set up procedures permitting "the establishment of the paternity of *any* child at any time prior to such child's eighteenth birthday." 42 U.S.C. § 666(a)(5) (Supp. III 1985) (emphasis added).

In addition, once a child support matter is initiated or reopened in Wisconsin, the court must take into consideration each parent's overall circumstances, so, for example, other children of a father would not be deprived of a proper level of support because of a support order for an illegitimate child. *See* Wis. Stat. § 767.25 (1)(b), (bz) (1981 & West Supp. 1987).

[9] Section 767.32(1) of the Wisconsin Code, as amended, provides that "[a]fter a judgment providing for child support under § 767.25, * * * the court may, from time to time, * * * revise and alter such judgment respecting the amount of such maintenance or child support and the payment thereof * * *." Wis. Stat. § 767.32(1) (1981 & West Supp. 1987).

[10] Petitioner thus does not seek to void lump-sum settlements entered under section 52.28. Nor does the Court have to reach a holding on the constitutionality of section 52.28. The only issue petitioner presents is whether the Wisconsin court's decision barring children *today* from seeking support because their mothers once accepted lump-sum settlements is a denial of equal protection and due process.

lump-sum settlements. That is a bar only illegitimate children can suffer. The Court should grant this Petition and reverse the Wisconsin Supreme Court because its interpretation of the Wisconsin legislature's classification based on illegitimacy contravenes controlling decisions of this Court protecting illegitimates under the equal protection clause of the Fourteenth Amendment from just such procedural barriers to a fair opportunity to seek paternal support.

B. *Precluding Modification of a Meager Lump-Sum Child Support Settlement Deprives the Child of Her Right To Seek and Obtain Paternal Financial Support Without Affording Her the Due Process Protections Mandated by the Fourteenth Amendment.*

The Wisconsin Supreme Court has held that "[i]mplicit in the Wisconsin statutes relating to paternity and financial support for children (whether born in or out of wedlock) is a recognition of the child's *judicially enforceable* right vis-a-vis the father to establish parentage and to obtain financial support." *In re the Paternity of R.W.L.*, 116 Wis. 2d 150, 158, 341 N.W.2d 682, 685 (1984) (emphasis added) (citing *J.M.S. v. Benson*, 98 Wis. 2d 406, 414, 415, 297 N.W.2d 18 (1980)). Under Wisconsin law, the "primary interest in the paternity action is that of the child." *In re the Paternity of R.W.L.*, 116 Wis. 2d at 158, 341 N.W. 2d at 685 (citing *Francken v. State*, 190 Wis. 424, 436, 209 N.W. 766, 772 (1926)). Despite its own prior holdings recognizing the child's legal entitlement, however, the Wisconsin Supreme Court's ruling in this case permanently denies any illegitimate child, on whose "behalf" a lump-sum agreement has been made, any opportunity to enforce his or her own right to paternal support, regardless of the obvious inadequacy of the agreement. This Court has held that such determinations cannot stand unless they meet the requirements of due process of law:

> [W]hen the judgment of a state court, ascribing to the judgment of another court the binding force and effect of *res judicata*, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in *both* litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes.

Hansberry v. Lee, 311 U.S. 32, 40 (1940) (emphasis added).

Heather Jo was not provided in the first litigation—between her mother and father—with an adequate forum in which to assert her right to child support. The Supreme Court of Wisconsin maintained that Heather Jo was "virtually" represented by her mother and Sauk County in that case. This Court's holdings on the procedures that must be made available to illegitimates seeking child support, however, make clear that the interests of mother and child under these circumstances are not always the same. The Court recognized in *Mills* that "[f]inancial difficulties caused by childbirth expenses or a birth-related loss of income, continuing affection for the child's father, a desire to avoid disapproval of family and community, or the emotional strain and confusion that often attend the birth of an illegitimate child all encumber a mother's filing of a paternity suit * * *." *Mills*, 456 U.S. at 100.[11] Justice O'Connor observed in concurrence that "[t]he possibility of * * * unwillingness to file suit" arising from such factors "underscores that the mother's and child's interests are not congruent * * *." *Mills*, 456 U.S. at 105 n.4 (O'Connor, J., concurring). These same factors could compel the mother of a newly born illegitimate child to settle for a small

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[11] *See also In re the Paternity of R.W.L.*, 116 Wis. 2d at 160-61, 341 N.W.2d at 686.

lump sum rather than enduring a trial to prove paternity.

The Wisconsin Supreme Court tried to explain away any concern about whether the interests of Heather Jo were adequately protected by noting that "the county's interest in the defendant father agreeing to provide the support, maintenance, and education of the child [was] parallel to that of the child." (App. 7a) This assertion fails to withstand even minimal scrutiny. The county's primary interest—demonstrated by the fact that it was paid nearly 25 per cent of the settlement amount—was in recovering the mother's lying-in expenses. The county's interest in settling to receive its lying-in expenses rather than running the risks of proving paternity is in direct conflict with that of the child.[12]

Despite the facts that Heather Jo's mother approached the settlement under difficult circumstances and the interests of the county were in conflict with those of Heather Jo, no *guardian ad litem* was appointed to represent her. Petitioner does not claim that due process requires a guardian to be appointed in every proceeding in which natural parents litigate or settle interests affecting the child. Here, however, a guardian has been appointed and is prepared to present facts concerning the interest of the child that were not heard in the proceeding between the parents. Due process does not permit the child to be barred at the outset in the proceeding brought by the guardian: "[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process

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[12] Furthermore, the county's interest in disposing of paternity cases expeditiously, by offering terms to which the father is likely to agree, conflicts with that of the child in seeking to prove paternity and obtain a more substantial and adequate agreement of support. *See In re the Paternity of R.W.L.*, 116 Wis. 2d at 161-62, 341 N.W.2d at 686.

must be given a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971). The Wisconsin Supreme Court decision giving preclusive effect to lump-sum settlements for child support of illegitimates fails to "fairly insure[] the protection of the interests of the absent part[y who is] to be bound * * *." *Hansberry v. Lee*, 311 U.S. at 42. This Court accordingly should review and reverse the Wisconsin Supreme Court decision.

II. This Court Should Grant Certiorari Because the Wisconsin Supreme Court's Holding Contributes to the Conflict Among the State Courts Concerning the Application of the Principles of Equal Protection and Due Process to the Support Rights of Illegitimate Children.

The Wisconsin Supreme Court decision adds to the conflict among various states concerning whether illegitimate children are entitled to support rights routinely provided to legitimate children. The opinion of the Wisconsin Supreme Court is one of a group of state court decisions that deny illegitimate children the opportunity to request judicial consideration of paternal support because a prior resolution of the support issue was reached in a proceeding to which the child was not a party.

Like the Wisconsin court, the Court of Appeals of New York, in *Bacon v. Bacon*, 46 N.Y.2d 477, 386 N.E.2d 1327, 414 N.Y.S.2d 307 (1979), upheld a state statute which gave judicially approved settlement agreements between the mother and the putative father of an illegitimate child preclusive effect as to all other support remedies, including modification, otherwise available to the child or mother. The court held that the statute did not "run[] afoul of the constitutional guarantee of equal protection of the laws." *Bacon*, 46 N.Y.2d at 479, 386 N.E.2d at 1328, 414 N.Y.S.2d at 307. Similarly, the New Jersey Supreme Court has held that, under the law of

Pennsylvania, a mother's agreement to release the father from any duty to pay child support bars her from later action on behalf of the child, and it cited authority that the agreement also binds the illegitimate child. *State ex rel. Acorman v. Pitner*, 42 N.J. 251, 254, 200 A.2d 104, 107 (1964).[13]

In contrast, other state courts have rejected the notion that an earlier resolution of the support issue between the parents restricts the rights of illegitimate children to obtain support on their own. The Georgia Supreme Court explicitly held in *Worthington v. Worthington*, 250 Ga. 730, 301 S.E.2d 44 (1983), that a mother's statutorily sanctioned release of all support obligations of the putative father in consideration of $10,000 did not waive the illegitimate child's right to seek support from the father. While the court eventually rested its decision on an interpretation of the applicable statute which limited the preclusive effect of a contract of support entered into in order to avoid legal action, the opinion began with the court's proclamation that on grounds of policy alone it "would not hesitate to find that the protection of the non-waiver doctrine [accorded the children of divorce seeking modification] should be extended to illegitimate children." *Worthington*, 250 Ga. at 731, 301 S.E.2d at 46.

The Colorado Supreme Court, in a case holding that a father of an illegitimate child had the right to seek

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[13] Other state courts have assumed the non-modifiability of child support for illegitimate children. The Alabama Supreme Court has suggested that a court-approved settlement agreement would preclude an illegitimate child's suit for support even though an unapproved agreement would not. *Kamp v. Morang*, 173 So. 2d 566 (Ala. 1965). Holdings of the Arizona Court of Appeals, the Oregon Court of Appeals, the California Court of Appeals and the Court of Appeals of Michigan carry the same implication. *See Bill By and Through Bill v. Gossett*, 132 Ariz. 518, 647 P.2d 649 (Ct. App. 1982); *Fox v. Hohenshelt*, 19 Or. App. 617, 528 P.2d 1376 (1974); *Everett v. Everett*, 57 Cal. App. 3d 65, 129 Cal. Rptr. 8 (1976); *Tuer v. Niedoliwka*, 92 Mich. App. 694, 285 N.W.2d 424 (1979).

modification of a jury verdict of support in spite of a state statute to the contrary, noted that giving permanent effect to a determination of support would also violate the child's right to equal protection. *Munn v. Munn*, 168 Colo. 176, 177, 450 P.2d 68, 69 (1969). In 1984, the Nebraska Supreme Court held that a showing of changed circumstances adequately supported modification of an order of support for an illegitimate child. *State ex rel. Toledo v. Bockmann*, 218 Neb. 420, 355 N.W.2d 521 (1984).[14]

Moreover, various state courts have declined to give preclusive effect, in later proceedings brought by or on behalf of an illegitimate child, to judgments in prior actions brought by another party. In *Gammon v. Cobb*, 335 So. 2d 261, 266-67 (Fla. 1976), the Florida Supreme Court stated that the mother of an illegitimate child could not contract away the child's right to support. The Ohio Supreme Court declined to give res judicata effect to a dismissal with prejudice of a paternity suit brought by the mother of an illegitimate child in *Johnson v. Norman*, 66 Ohio St.2d 186, 421 N.E.2d 124 (1981). The North Carolina Supreme Court held that an illegitimate child could bring a second paternity action despite a ruling in favor of the putative father in a prior suit brought by another party, since the child was not in privity with any party to the initial action. *Settle by and Through Sullivan v. Beasley*, 309 N.C. 616, 308 S.E.2d 288 (1983).[15]

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[14] Intermediate appellate courts in other states also have refused to preclude the modification of judicially sanctioned support decrees on behalf of illegitimate children. *See Ibanez v. Salazar*, 459 So. 2d 346 (Fla. Dist. Ct. App. 1984); *Kennerson v. Malveaux*, 457 So. 2d 251 (La. Ct. App. 1984); *People ex rel. Spicer v. Coleman*, 72 Ill. App. 3d 631, 391 N.E.2d 46 (1979).

[15] Intermediate state appellate courts also have recognized that the rights of the illegitimate child cannot be adequately protected if prior actions to which the child was not a party are given pre-

Thus, the state courts which have addressed the issue have rendered conflicting opinions on whether the Constitution mandates that a decision establishing responsibility for the financial support of an illegitimate child, to which the child was not a party, must be modifiable as are such decisions concerning legitimate children. The importance of resolution of this issue by this Court can hardly be overstated. In the states that hold that child support awards to illegitimates are not modifiable, thousands of children, like Heather Jo Krueger, are denied the right to support that is guaranteed to their legitimate counterparts. The burden that this puts on their mothers or others who have custody, and the states that often are called upon to support them through public assistance, warrants review by this Court.

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clusive effect as to the child. The Arizona Court of Appeals has held that a mother's statutorily sanctioned and approved compromise and settlement of a prior paternity action could not bar the child's right, by *guardian ad litem*, to establish parentage. *Backora v. Balkin*, 14 Ariz. App. 569, 485 P.2d 292 (1971). The court refused to "speculate," however, on whether the purpose of the suit was ultimately to seek support, and declined to address what estoppel effect the prior settlement might have on that issue. *Backora*, 14 Ariz. App. at 572, 485 P.2d at 295. The Minnesota Court of Appeals has similarly held that a stipulated agreement in a paternity proceeding did not preclude a later suit for modification. *Quaderer v. Forrest*, 387 N.W.2d 453 (Minn. Ct. App. 1986). Several state courts of appeals have refused to preclude a child's right of action on the grounds that the child was not in privity with any party to a prior action. *See, e.g., Dept. of Health and Rehabilitative Services, ex rel. Ward v. Wyatt*, 475 So. 2d 1332 (Fla. Dist. Ct. App. 1985); *In re Smith*, 16 Ohio App. 3d 75, 474 N.E.2d 632 (1984); *In re Burley*, 33 Wash. App. 629, 658 P.2d 8 (1983).

CONCLUSION

For all of the foregoing reasons, petitioner Annette L. Gerhardt respectfully seeks this Court's review of the decision of the Supreme Court of Wisconsin.

Respectfully submitted,

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APPENDIX

APPENDIX

STATE OF WISCONSIN
IN SUPREME COURT

No. 85-0943

ANNETTE L. GERHARDT, As Guardian ad Litem for
HEATHER JO KRUEGER,
Plaintiff-Appellant,

v.

ESTATE OF ARLEN L. MOORE,
Defendant-Respondent.

[Filed June 26, 1987]

APPEAL from an order of the Circuit Court for Sauk County: JAMES R. SEERING, Reserve Judge. *Affirmed.*

WILLIAM G. CALLOW, J. This is an appeal from an order of the circuit court for Sauk County, Judge James R. Seering presiding, dismissing the plaintiff's motion to compel support. This appeal is before us on certification by the court of appeals.

The court of appeals certified four issues to this court. The first of these issues, which we find dispositive of this appeal, was stated as follows:

> "Under *In re Paternity of R.W.L.*, 116 Wis. 2d 150, 341 N.W. 2d 682 (1984), is an agreement entered into in 1970 pursuant to ch. 52, Stats., 1967, by a nonmarital child's mother, father and the dis-

> trict attorney, whereby the father admitted paternity and agreed to pay a lump sum settlement of $4,600 for support and lying-in expenses incurred as a result of the child's birth, and which provided that it constituted full and final settlement of the action, *res judicata* as to an action for child support commenced by the child in 1984?"

Because we find the resolution of this issue dispositive, we do not reach the other issues which were certified.[1]

We must determine whether Heather Jo Krueger, a child born out of wedlock, may initiate a new paternity and support action against the alleged father, where, pursuant to Chapter 52, Stats. 1967, the child's mother and father, their respective attorneys, the District Attorney for Dane County, and the Sauk County Corporation Counsel had previously entered into a support agreement which was complied with fully and purported to constitute a full and final settlement of all support claims. Because we conclude that the prior paternity agreement bars the present action under res judicata, we affirm the order of the circuit court.

The facts are undisputed. On September 7, 1969, Heather Jo Krueger was born out of wedlock to Betty Lou Krueger, a resident of Sauk County. Sometime

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[1] The other issues certified to this court are as follows:

"If the agreement is not *res judicata* as to the child, does she have a cause of action against her father for child support? If so, must she establish paternity in her action, or can she rely on the admission of paternity in the 1970 agreement?

"If the child has a cause of action against her father for child support, may she maintain a common-law cause of action or is the action brought pursuant to sec. 767.25, Stats., and subject to sec. 767.25(5), which limits liability for past support to the period after commencement of the action?

"Does equal protection then require that marital children [will] also be able to bring actions for child support against noncustodial parents?"

thereafter, the state of Wisconsin, plaintiff, by Betty Lou Krueger, complainant, filed an action against Arlen L. Moore, a resident of Dane County, defendant, under Chapter 52, Stats. 1967, seeking to have Moore adjudicated the father of Heather Jo Krueger (Krueger) and seeking contribution for Krueger's support. On October 27, 1970, an agreement was entered into wherein Moore admitted paternity and agreed to pay a lump sum for support. The agreement was drafted and approved by a Dane County Assistant District Attorney, was signed by Krueger's mother, as complainant, Moore, as defendant, and their respective attorneys. The agreement was also approved by the Sauk County Corporation Counsel and Dane County Judge Mittelstadt. No guardian ad litem was appointed or appeared on behalf of Krueger. Findings and a judgment, based upon the agreement, were also signed by Judge Mittelstadt.

Under the settlement, the defendant agreed to pay a total of $4,600 over a period of time as a lump sum settlement for medical expenses paid by Sauk County as a result of Krueger's birth and for child support. Specifically, the settlement provided for the payment of $3,600 in child support to be paid at the rate of $75 per month for forty-eight months, and $1,000 for medical reimbursement to Sauk County to be paid at the rate of $20 per month for fifty months. Moreover, paragraph 9 of the agreement provided as follows:

> "That this agreement and full and complete performance thereof shall constitute full and final settlement of this action, pursuant to the provisions of Chapter 52, Wisconsin Statutes, 1967."

The defendant complied with the terms of the agreement and made all payments in a timely manner. Pursuant to the agreement, and in accordance with the statute in effect in 1970, the defendant's support obligation ended with his last payment which was made in late

1974. The defendant has made no further contributions to the support of Krueger.

On November 20, 1984, Krueger, by her guardian ad litem, commenced this action against Moore (defendant), now deceased, seeking past, present, and future support. The guardian ad litem requested that the defendant pay 17 percent of his gross income from November 1, 1974, for Krueger's past, present, and future support, that he provide medical insurance, pay 50 percent of her uninsured medical bills, and name her as an irrevocable primary beneficiary on a life insurance policy. Krueger also requested that a temporary order for support be made pursuant to sec. 767.23 (1), Stats. The defendant moved to dismiss the action on the ground that the petition raised issues which were previously adjudicated in their entirety; thus, the action was barred under the doctrine of res judicata.

The Sauk County Family Court Commissioner certified the motion for temporary support and the motion to dismiss to the circuit court for Sauk County. Following a hearing on the motions and the submission of briefs, the circuit court rendered a memorandum decision in which the court held that the doctrine of res judicata barred Krueger's action for support. According to the circuit court, because the defendant had complied fully with the law at the time the agreement was entered into, the defendant could not now be sued by the child for more support.

The circuit court distinguished this court's decision in *In re Paternity of R.W.L.*, 116 Wis. 2d 150, 341 N.W. 2d 682 (1984), in which we held that, because a district attorney does not represent the interests of an illegitimate child in deciding whether to bring a separate paternity action, an illegitimate child has a right to bring a separate paternity action on his or her own behalf. The circuit court concluded that the independent cause of

action recognized in *R.W.L.* was dependent upon the absence of a paternity determination. The circuit court stated that in *R.W.L.* a different result might have been reached if the issue of paternity had been completely resolved.

An order of dismissal was filed on May 13, 1985. Krueger appealed the order of dismissal to the court of appeals. On December 2, 1986, we accepted the court of appeals' certification of the appeal.

The issue on appeal involves a question of whether the doctrine of res judicata bars a support action by a child born out of wedlock where a prior settlement agreement, made pursuant to statutory direction, purporting to be a complete and final determination of paternity and support, has been entered into and complied with fully. The determination of whether the doctrine of res judicata applies is a question of law. *DePratt v. West Bend Mutual Insurance Co.*, 113 Wis. 2d 306, 310, 334 N.W. 2d 883 (1983). We, therefore, need not defer to the circuit court's determination. *Treiber v. Knoll*, 135 Wis. 2d 58, 64, 398 N.W. 2d 756 (1987).

Under the doctrine of res judicata, "a final judgment is conclusive in all subsequent actions between the same parties as to all matters which were litigated or which might have been litigated in the former proceedings." *DePratt*, 113 Wis. 2d at 310. The purpose behind the doctrine of res judicata is to prevent multiple litigation involving the same cause of action or claim. Fairness to the defendant requires that at some point litigation over the particular controversy must come to an end. *Id.* at 311.

For an initial action to bar a subsequent action, there must be an identity of the parties or their privies and an identity of causes of action or claims in the two cases. *Id.; Leimert v. McCann*, 79 Wis. 2d 289, 294, 255 N.W. 2d 526 (1977). Here, we clearly have an iden-

tity of causes of action. Both the initial paternity proceeding brought in 1970 and this action are premised on the same set of underlying circumstances. Whether there exists an identity of the parties is not as clear. Although the defendant in both actions is identical, the plaintiff in this action, Krueger, was not an actual party in the first paternity action. Thus, whether Krueger is bound by the earlier agreement depends upon whether there was a relationship between Krueger and the parties to the agreement such that one of the parties would be considered to have represented her.

Much emphasis has been placed by Krueger on this court's recent decision in *R.W.L.* in which we held that an illegitimate child has a separate cause of action (separate from the district attorney) to bring a paternity action against the alleged father. 116 Wis. 2d at 162. Relying upon our conclusion that we had previously erred in holding that the legislature provided for the virtual representation of the child in the paternity determination through the district attorney, Krueger asserts that *R.W.L.* stands for the proposition that there is no relationship between the parties in a paternity action and the child which would cause the district attorney or the mother to be recognized as representing the child. Such a conclusion reads too broad a meaning into *R.W.L.* Our determination in *R.W.L.* was that the district attorney, *in deciding whether to initiate* a paternity action, did not represent the interests of the illegitimate child. We specifically declined to address the question of whether the mother may have substantially the same interests as the child and, therefore, was the child's representative in initiating a paternity action. We did not address the question of whether either the district attorney or the mother represents the interests of the child in a paternity action.

We are satisfied that, where a mother of a child born out of wedlock entered into a court approved settlement agreement with the alleged father, pursuant to Chapter

52, Stats. 1967, the child's interests were virtually represented by the mother. In the typical settlement proceeding under Chapter 52, it was the practice for the custodial parent to speak for the child. This practice recognized the fact that the custodial parent was best suited to understand and protect the needs of the child.

In addition, a custodial mother's interest and that of the child in a paternity proceeding are in many respects identical. Both have an interest in obtaining the father's assistance in providing for the child's support, maintenance, and education. The mother's interest in assistance from the father is very strong; any support that the father fails to provide becomes the responsibility of the mother. In this respect it can be seen that the mother's interest is more closely tied to the child than that of any other party or potential party.

We note that Sauk County's participation in the 1970 agreement provides further evidence that Krueger's interests were represented in the initial paternity action. The focus of a claim for support is providing support sufficient to meet the needs of that child. Although primary responsibility rests with the parents, in the absence of adequate support from either or both parents, it is the obligation of the county in which the child resides to support the child. Because of this residual obligation, the county's interest in the defendant father agreeing to provide the support, maintenance, and education of the child is parallel to that of the child.

The 1970 statutory procedures recognized that there were three possible parties who were obligated, in concert, to provide adequate support for a child born out of wedlock.[2] The child's interest in receiving support, however,

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[2] Section 52.24, Stats. 1967, in providing that the district attorney may bring a paternity action if the child is or is likely to become a public charge, recognizes the county's potential obligation to support the child.

was not in which party provided support, but only that adequate support was provided. Where the parties agreed to what extent any one party would provide support, with the balance of the obligation falling upon the other parties, and that agreement receives court approval, then the child's interest has been adequately protected pursuant to the statute.

Moreover, the statutory procedure for entering into a paternity settlement was designed to protect not only the public interest but also the illegitimate child. *See Smazal v. Estate of Dassow*, 23 Wis. 2d 336, 340, 127 N.W. 2d 234 (1964). Chapter 52, Stats. 1967, provides for the prosecution of a paternity action by the district attorney if private counsel is not retained, the drafting of all agreements by the district attorney, and approval by the court. Compliance with these provisions guarantees legal representation of the mother and protects against a settlement which is not in the best interests of the child.

Krueger, however, argues that, even if she was represented in the prior proceeding, the representation was so inadequate as to constitute no representation. Relying upon sec. 52.37(2)(a) and (b), Stats. 1967, Krueger asserts that all settlements were to provide for the future support of the child until age eighteen. Krueger thus argues that, because the judgment requiring payment of a total of $3,600 toward Krueger's support is "inadequate to fulfill the directive of the statute that [Moore] be chargeable for the support of the child until the age of 18," any representation was so inadequate as to have been nonexistent. Accordingly, Krueger contends that she cannot be bound by the settlement. We disagree.

Implicit in the provision of a mechanism for a paternity settlement is the recognition that parties will accept a settlement which does not provide for the full support of the child until the age of eighteen. A settle-

ment, by its very nature, involves concessions by each party in an attempt to resolve the dispute without additional litigation. In reaching settlements, parties balance a number of competing interests, including the issue of paternity itself, the possibility of the father's absence by death or departure, the present financial position and the future income potential of the father, and present and future living expenses. Because many of these considerations are not predictable with any particularity, a lump sum settlement tends to be only an estimate which may, in hindsight, appear to be inadequate. However, where paternity is denied and the issue must go to trial, a settlement agreement may be a reasonable compromise.

We recognize that there could be compelling reasons to execute a settlement agreement, even though the amount of the settlement may appear to be low. It is important to understand that this settlement agreement was entered into in 1970. At that time, enforcement of a support award was often difficult. Moreover, the cost of living in 1970 was approximately one-third of what it is today. *See Consumer Price Index Detailed Report*, United States Department of Labor, Bureau of Labor Statistics (January, 1987). Although the settlement agreement in the present action appears, in hindsight, to be low, we are satisfied that it is not unconscionable.

We note that our recent decision in *In re Paternity of B.W.S.*, 131 Wis 2d 301, 388 N.W. 2d 615 (1986), is distinguishable from the present case. In *B.W.S.* we concluded that under Michigan law a settlement which provided for the deposit of $3,000 in trust for the benefit of the illegitimate child, with such money to be held until the child attained age eighteen, was inadequate as a matter of law. *Id.* at 314. We based this conclusion upon the fact that Michigan statutes and case law expressly provide that settlement agreements are binding only if the circuit court determines that the agreement makes adequate provision for the support and education

of the child. In reaching this conclusion, we quoted the following Michigan statute:

> "'An agreement or compromise made by the mother or child . . . concerning the support and education of the child shall be binding upon the mother and the child *only when the court having jurisdiction to compel support and education of the child shall have determined that adequate provision is reasonably secured by payment or otherwise* and has approved the agreement or compromise.
>
> "'(b) The performance of the agreement or compromise, when so approved, shall bar other remedies of the mother or child for the support and education of the child.' Section 722.713, Mich. Stats. (Emphasis added.)"

Id. at 310. In interpreting this section, we recognized that "[t]he key requirement for court approval of a settlement agreement under sec. 722.713, Mich. Stats., is that the circuit court determine that the agreement makes '. . . adequate provision for the support and education of the child. . . .'" *Id.* at 312. This 1970 Wisconsin paternity agreement, providing for the support of Krueger, is not subject to such a requirement.

Under sec. 52.28, Stats. 1967, a judgment shall be rendered upon a general agreement which considers all factors pertinent to fairness if the judge is "satisfied with the terms of the agreement." In addition, sec. 52.37, Stats. 1967, provides that the defendant father *shall* pay the lying-in expenses and the cost of the action while further providing that the defendant father is only *chargeable* for the future support of the child until the age of eighteen. The statutory provision that the defendant is merely chargeable recognizes that liability is limited to the terms of the agreement or, if no agreement, then to the amount fixed by the court.

Because we conclude that Betty Lou Krueger virtually represented Krueger's interest in the initial pa-

ternity proceeding, we hold that there exists an identity of the parties between the initial paternity proceeding and the proceeding initiated in this action. Having previously determined that there exists an identity of causes of action, we conclude that the 1970 paternity agreement, having been complied with fully, bars the action to compel support brought in this action. We note that this result is reached regardless of whether the present action was premised on a common law right to paternity, Chapter 767, Stats., or Chapter 52, Stats. 1967.

Krueger further argues that the paternity proceedings under Chapter 52 violate the principles of equal protection. According to Krueger, if we uphold the settlement agreement, we will in effect be creating a class of children, all illegitimate, who cannot seek additional support from their fathers, while legitimate children can. This contention is without merit. Children born out of wedlock (in the absence of a lump sum settlement), like those born in wedlock, may seek additional support from their father. *See* sec. 52.38, Stats. 1967; 36 Op. Att'y Gen. 222, 224 (1947): *State ex rel. Green v. Williams*, 49 Wis. 2d 752, 759, 183 N.W. 2d 37 (1971). Under sec. 52.38, paternity settlements are modifiable if they provide for periodic payments. While it is true that settlements which provide for a lump sum payment may not be modified, a lump sum settlement is merely one of two types of settlements available to provide for the support of children born out of wedlock. A child born out of wedlock is not denied equal protection simply because the statutes provide an additional, optional method for satisfying a support obligation.

By the Court:—The order of the circuit court is affirmed.

STATE OF WISCONSIN
IN COURT OF APPEALS
DISTRICT IV

No. 85-0943

ANNETTE L. GERHARDT, as Guardian
ad Litem for H.J.K.,
Plaintiff-Appellant,

v.

A.L.M.,
Defendant-Respondent.

[Filed Nov. 4, 1986]

CERTIFICATION BY COURT OF APPEALS OF
WISCONSIN

Before Dykman, Eich and Sundby, JJ.

ISSUES

(1) Under *In re Paternity of R.W.L.*, 116 Wis. 2d 150, 341 N.W.2d 682 (1984), is an agreement entered into in 1970 pursuant to ch. 52, Stats., 1967, by a non-marital child's mother, father and the district attorney, whereby the father admitted paternity and agreed to pay a lump sum settlement of $4,600 for support and lying-in expenses incurred as a result of the child's birth, and which provided that it constituted full and

final settlement of the action, *res judicata* as to an action for child support commenced by the child in 1984?

(2) If the agreement is not *res judicata* as to the child, does she have a cause of action against her father for child support? If so, must she establish paternity in her action, or can she rely on the admission of paternity in the 1970 agreement?

(3) If the child has a cause of action against her father for child support, may she maintain a common-law cause of action or is the action brought pursuant to sec. 767.25, Stats., and subject to sec. 767.25(5), which limits liability for past support to the period after commencement of the action?

(4) Does equal protection then require that marital children also be able to bring actions for child support against noncustodial parents?

FACTS

H.J.K. was born on September 7, 1969 to B.L.K., an unmarried woman. B.L.K. alleged that A.L.M. was the child's father. The district attorney commenced a paternity action against A.L.M. pursuant to ch. 52, Stats., 1967. The parties reached an agreement in February, 1970 whereby A.L.M. admitted to paternity, and agreed to contribute $3,600 for the child's support in payments of $75 per month for forty-eight months and to reimburse Sauk county $1,000 for medical expenses paid on behalf of B.L.K. The agreement provided that it constituted a full and final settlement of the action. It was approved by the trial court and entered as a judgment in October, 1970. A.L.M. made the required payments, which ended in late 1974.

H.J.K.'s guardian ad litem filed a "Petition to Compel Support" in November, 1984, alleging that A.L.M. was H.J.K.'s father and that he had not paid for her support

since November 1, 1974. She requested that A.L.M. pay seventeen percent of his gross income since November 1, 1974, for H.J.K.'s past, present, and future support, and that he provide medical insurance, pay fifty percent of her uninsured medical bills, and name her as an irrevocable primary beneficiary on a life insurance policy.

A.L.M. moved to dismiss on the ground that the 1970 agreement was *res judicata*. The trial court agreed and dismissed the petition. The guardian ad litem appeals from the dismissal order.

DISCUSSION

Chapter 52, Stats., before its 1981 amendments ("pre-1981 law") had been interpreted to provide that only the district attorney could commence an action to establish paternity and compel support for nonmarital children. *In re Paternity of R.W.L.*, 116 Wis.2d at 162, 341 N.W.2d at 687, held that the pre-1981 law did not provide the exclusive remedy or forum for a nonmarital child to establish paternity because the district attorney did not have substantially the same interests as the child and, therefore, could not be considered the child's representative in a paternity action. The guardian ad litem argues that the 1970 agreement cannot be *res judicata* as to H.J.K. since, under *R.W.L.*, she did not have substantially the same interests as the district attorney, and therefore, was not a party to the proceeding.

A.L.M. contends that *R.W.L.* should be distinguished because no prior determination of paternity and order of support had been made, unlike here. He argues that the district attorney represented the child's interest in entering the 1970 agreement. The guardian ad litem disagrees, noting that even if H.J.K. was represented in the prior proceeding, the representation was so inadequate as to be nonexistent.

The guardian ad litem also contends that the pre-1981 law violated H.J.K.'s right to equal protection by giving her a lesser right to support than marital children. Therefore, she contends the agreement entered into pursuant to that statute should not bar H.J.K.'s right to additional support. A.L.M. responds that there must be finality in the law, and that it is unfair and inequitable to proceed against him fifteen years after he thought his support obligation had been satisfied.

The guardian ad litem contends that, if the 1970 agreement does not bar the present action, H.J.K. should be able to rely on A.L.M.'s admission of paternity. She argues that A.L.M. should not be permitted to challenge the admission since he was fully represented in the prior proceeding. A.L.M. responds that H.J.K. should not be entitled to rely on the admission since he may not have admitted paternity in the prior proceeding if the admission had not been a condition for the lump sum settlement.

A.L.M. argues that sec. 767.45, Stats., which created a child's cause of action for paternity, cannot be applied to agreements made prior to July 1, 1981. The guardian ad litem responds that she is not attempting to reopen the 1970 agreement.

Although not briefed by the parties, this court questions whether the child may seek support retroactive to 1975, in light of sec. 767.25(5), Stats., which provides that "[l]iability for past support shall be limited to the period after commencement of the action." The guardian ad litem argues that the action was brought under both ch. 767 and as an independent action for support as allegedly recognized in *R.W.L.* She contends that the statutory prohibition against recovery of retroactive support does not apply to an independent action for support. If such an independent action exists, does equal protection require that it also be available for marital children?

If the child prevails, should the support be paid to her directly, or to her mother, in light of the fact that the child is still a minor? If the latter, is the mother the real party in interest, and would she then be bound by the 1970 agreement? If the child prevails, is she entitled to past support even though she has been supported? Is A.L.M. entitled to set off support furnished the child by others? Is she entitled to double support?

CONCLUSION

The proper application of *R.W.L.* to the facts of this case is an issue of statewide importance which could affect many other paternity settlements entered under the pre-1981 law. The supreme court should clarify which remedies are available to children should it conclude that they are not bound by such agreements. The court of appeals therefore certifies this case to the supreme court under Rule 809.61.

Dated this *4th* day of November, 1986.

Copies to: Annette L. Gerhardt
Conway, Conway & Gerhardt
121 Fifth Street
Baraboo, WI 53913

Gary Alan Hebl
Hebl & Hebl
1150 W. Main Street
Sun Prairie, WI 53590

STATE OF WISCONSIN
CIRCUIT COURT
SAUK COUNTY

Branch 2

Case No. 84-CV-574

ANNETTE L. GERHARDT, as Guardian ad litem for HEATHER JO KRUEGER,

Petitioner,

vs.

ARLEN LEE MOORE,

Respondent.

MEMORANDUM DECISION

This matter is presently before the Court on the respondent's motion to dismiss the petition of the petitioner with prejudice.

FACTS

The facts are simple and undisputed. They are as follows: On February 7, 1969, Betty Lou Krueger, gave birth to a female child named Heather Jo Krueger. Betty Lou Krueger charged Arlen Lee Moore, the respondent in this action, with being the father of the child.

At the time Heather Jo was born, the respondent, Arlen Lee Moore and Betty Lou Krueger were not married. Subsequent to the birth of Heather Jo and sometime in February of 1970, Betty Lou Krueger and Arlen Lee Moore and their respective attorneys entered into an agreement whereby the respondent, Arlen Lee Moore, agreed to pay the total sum of $4,600.00 over a period

of time as a lump sum settlement for support and lying-in expenses incurred as a result of the birth of Heather Jo. This agreement was drafted and approved by the Assistant District Attorney for Dane County, Wisconsin. It was approved by the Corporation Counsel of Sauk County and approved by Russell J. Mittelstadt, Judge, Dane County, Wisconsin.

It is apparently conceded that the respondent fully and completely abided by the agreement. It should be noted that, as a condition of this agreement, the respondent, Arlen Lee Moore, admitted that he was the father of Heather Jo.

Paragraph 9 of the agreement provides as follows:

> "That this agreement and full and complete performance thereof shall constitute full and final settlement of this action, pursuant to the provisions of Chapter 52, Wisconsin Statutes 1967."

In accordance with this agreement, findings and judgment were entered.

The instant action has been brought by Annette L. Gerhardt, Guardian ad litem for Heather Jo Krueger, petitioner, asking this Court to enter an order requiring Arlen Lee Moore to pay support for Heather.

As indicated at the outset, the respondent has filed this motion to dismiss on the grounds that the instant action is barred by the agreement entered into by Betty Lou and Arlen in 1970.

DECISION

In the Court's view, this is a matter of first impression in the State of Wisconsin. Up until 1981, illegitimacy proceedings were covered by Chapter 52 of the Wisconsin Statutes. Commencing in 1981, Section 767.45 Wisconsin Statutes and subsequent sections established a new procedure for determining paternity. Clearly, un-

der the new Section 767.45, Heather Jo has a right to bring this action of support against her father. The Court notes that, under Section 767.45, according to Wisconsin Statutes Annotated, there is the following notation:

> Applicability. L.1979, c. 352, Paragraph 40 provides:
>
> "This act applies to all paternity proceedings commenced after the effective date of this act. This act applies to all paternity proceedings commenced but not reduced to judgment or concluded prior to the effective date of this act. However, this act does not apply to paternity judgments or to any motion concerning paternity judgments or any paternity proceeding otherwise completed prior to the effective date of this act, except for motions to modify child support."

The question presented is, does Section 767.45 have retroactive application? At the time the agreement and judgment were entered into by the respondent, he fully and completely complied with the statutes as they then existed. Similarly, at the time this agreement was entered into, the decisions by the Wisconsin Supreme Court upheld the constitutionality of the procedures set forth in Chapter 52. See *J.M.S v. Benson*, 98 Wis. 2d 406 (1980).

It would appear from the face of the agreement that the respondent was represented by counsel, was reliably advised that the Assistant District Attorney and Corporation Counsel of Sauk County and a Dane County Judge would approve the agreement, and did enter into the agreement.

The Wisconsin Supreme Court *In Re: Paternity of R.W.L.* 116 Wis. 2d 150 overruled *Benson* and held that the procedure for determining paternity prior to the

1981 statute was unconstitutional, and that prior to the 1981 statute the child was entitled to bring an independent action for support. If *R.W.L.* is to be given retroactive effect, it would be difficult to determine whether or not there were any valid illegitimacy agreements prior to 1981.

The Supreme Court, in deciding the case of *R.W.L.*, made no references to the note cited earlier as to the effective date of Section 767.45 of the Wisconsin Statutes. It should further be noted that in the case of *R.W.L.* there was never any determination of paternity, because the case was dismissed on the ground it was barred by the statute of limitations. In *R.W.L.*, the Court held there was no statute of limitations, because the child had an independent cause of action which existed prior to 1981.

Thus, this Court is presented with a situation where the respondent has fully and completely complied with the law, as provided by the statute and as interpreted by the Supreme Court. Should he now be subjected to another claim for support for this child?

The concept of res judicata has long been a kingpin of Anglo Saxon law. Therefore, this Court is going to hold in this case that the respondent, having fully complied with the law as it existed at the time the agreement was entered into, cannot now be sued by the child for yet more support. It would appear that, in *R.W.L.*, the Supreme Court did not deal with this particular situation. This Court frankly believes that if, in *R.W.L.*, the issue of paternity had been completely resolved, a different result might have been obtained. The Court is, therefore, going to grant the respondent's motion to dismiss, with prejudice. *R.W.L*, in this Court's opinion, must be limited to its facts.

In closing, the Court would point out that the petitioner in this case is happy to accept respondent's ad-

mission of paternity and the money that he has paid as a result of that admission. If the statute is unconstitutional for all purposes, as the petitioner contends, it would seem to the Court that the admission of paternity, having been made presumably to obtain the advantage of a lump sum settlement, would have to be vacated. It would likewise seem that any and all monies paid by the respondent to Heather's mother would have to be returned to the respondent, with interest, and then this proceeding could commence. The Court cannot conceive that the Supreme Court contemplated that such a situation should develop.

The Court will concede that there is language in *R.W.L.* which would support the petitioner's position, but would point out that that language must be taken in the context of the factual situation presented in *R.W.L.*

In conclusion, this Court is satisfied that if petitioner's contentions are correct in regard to interpretation of *R.W.L.*, it cannot perceive how any attorney could advise any client, in any area, with any degree of certainty. When a competent attorney examines statutory law, and examines decisions of the Supreme Court, interpreting that law, there is little more an attorney can do. If this standard approach is insufficient, no attorney could meaningfully advise any client. Finality is not only a virtue, but a necessity. Changes in the law can certainly be made, but not at the price of invalidating fully consummated contracts.

The Court, in this decision, is not insensitive to the needs of the minor child. This Court firmly believes that parents should support their children. However, if res judicata is to have any meaning whatsoever, it must have meaning in a case such as this.

Respondent's counsel will be directed to draft an order of dismissal, submit it to opposing counsel for approval

as to form, and then to the Court, within two weeks of this date.

Dated this 25th day of April, 1985.

BY THE COURT:

/s/ J. R. Seering
J. R. SEERING
Circuit Judge

STATE OF WISCONSIN
CIRCUIT COURT
SAUK COUNTY

Case No.: 84 CV 574

ANNETTE L. GERHARDT, as Guardian ad Litem for
HEATHER JO KRUEGER,
Plaintiff,

vs.

ARLEN LEE MOORE,
Defendant.

ORDER OF DISMISSAL

WHEREAS, this instant action was commenced by the filing of a Summons and Complaint in Sauk County Circuit Court on November 20, 1984 and the subsequent personal service upon the defendant-respondent, Arlen Lee Moore on November 26, 1984; and

WHEREAS, the defendant-respondent, by and through his attorneys, HEBL, HEBL, HEBL & DESMOND-HEBL, made a motion to this Court for Dismissal of the instant action, said motion having been made on or about December 17, 1984; and

WHEREAS, the plaintiff-petitioner, by and through her Guardian ad Litem, Annette L. Gerhardt, presented the Court with an Order to Show Cause for Temporary Order; and

WHEREAS, a hearing was held on the Motion to Dismiss and on the Motion for Temporary Order by the Court on March 1, 1985; and

WHEREAS, the Court asked for and was presented with Briefs in support of the Motion and in opposition to the motion; and

WHEREAS, the Court has made and entered its MEMORANDUM DECISION, dated April 25, 1985, wherein it finds that the Defendant-Respondent is entitled to Dismissal of the pending action and wherein the court has directed that "Respondent's" counsel is directed to draft an order of dismissal,

NOW, THEREFORE, Upon motion by Gary Alan Hebl, attorney for the Defendant-Respondent, and upon the MEMORANDUM DECISION, and upon the entire record and file herein,

IT IS ORDERED:

That the above and foregoing action be and is hereby dismissed with prejudice.

Dated at Baraboo, Wisconsin, this 9th day of May, 1985.

BY THE COURT:

/s/ J. R. Seering
J. R. SEERING
Circuit Judge

APPROVED AS TO FORM:

/s/ Annette L. Gerhardt
Attorney at Law
for Plaintiff-Petitioner

SUPREME COURT
OF WISCONSIN
P.O. Box 1688
Madison, WI 53701-1688

Telephone (608) 266-1880

MARILYN L. GRAVES
Clerk

August 18, 1987

To: ANNETTE L. GERHARDT
CONWAY, CONWAY & GERHARDT
121 5th St.
Baraboo, WI 53913

GARY A. HEBL
HEBL & HEBL
1150 W. Main St.
Sun Prairie, WI 53590

The Court today announced an order in your case as follows:

District 4
Gerhardt v. Moore, 85-0943

Motion for Reconsideration denied, with costs.

Day, J. did not participate.

MARILYN L. GRAVES
Clerk of Supreme Court

STATE OF WISCONSIN
COUNTY COURT
DANE COUNTY
BRANCH II

STATE OF WISCONSIN,
Plaintiff

by BETTY LOU KRUEGER,
Complainant,

vs.

ARLEN LEE MOORE,
Defendant.

AGREEMENT

WHEREAS, the above named complainant, Betty Lou Krueger, an adult, has given birth to a female child, out of wedlock, at Madison, Wisconsin; and

WHEREAS, the complainant alleges that the above named Arlen Lee Moore, an adult, herein designated as the defendant, is the father of said child, this agreement entered into by and between the parties and their respective attorneys, Ted C. Boyle, on behalf of the complainant and William Bradford Smith, on behalf of the defendant, and said parties appearing personally;

IT IS AGREED

1. That the complainant and the defendant both submit personally to the jurisdiction of the County Court, Branch II, for Dane County, Wisconsin;

2. That the complainant and the defendant have never intermarried;

3. That on the 7th day of September, 1969, the complainant gave birth out of wedlock, to a female child, since named Heather Jo Krueger; that said child is alive; that the defendant is a resident of Dane County, Wisconsin;

4. That the complainant alleges that the defendant is the father of said child;

5. That the defendant admits that he is the father of said child;

6. That the defendant consents to entry of judgment in accordance with the terms of this agreement.

7. That the defendant agrees to contribute to the future support of and maintenance of said child in the following manner: The defendant will pay to the Clerk of County Court, Branch II, for Dane County, Wisconsin, the sum of $75.00 per month beginning on the [illegible] day of [illegible], 1970, and a like amount of $75.00 per month on the 1st day of each month thereafter for a period of 48 month making a total payment of $3,600.00. Defendant further agrees to pay to Sauk County, Wisconsin, the sum of $1,000.00 for medical reimbursement paid on behalf of the complainant at the rate of $20.00 per month for 50 months beginning December 1, 1970.

8. That the defendant will pay to the Clerk of County Court Branch II, all costs and disbursements of this action.

9. That this agreement and full and complete performance thereof shall constitute full and final settlement of this action, pursuant to the provisions of Chapter 52, Wisconsin Statutes 1967.

DRAFTED AND APPROVED BY:

/s/ [Illegible]
Assistant District Attorney
for Dane County, Wisconsin

In the presence of:

/s/ [Illegible]

/s/ [Illegible]

Signed:

/s/ [Illegible]
Complainant

/s/ [Illegible]
Defendant

/s/ [Illegible]
Complainant's Attorney

/s/ [Illegible]
Defendant's Attorney

This agreement is hereby approved and is ordered to be placed on file.

APPROVED BY:

/s/ Paul [Illegible]
Sauk County Corporation Counsel

/s/ Russell J. Mittelstadt
Judge
County Court, Branch
Dane County, Wisconsin

Signed and approved this [illegible] day of February, 1970.

STATE OF WISCONSIN
CIRCUIT COURT
SAUK COUNTY

IN THE MATTER OF THE APPOINTMENT
OF A GUARDIAN AD LITEM FOR
HEATHER JO KRUEGER, A MINOR.

ORDER APPOINTING GUARDIAN AD LITEM

On reading and filing the attached petition, and the attached affidavit of Annette L. Gerhardt, in which she consents to act as Guardian ad Litem for the above named minor, from all of which it satisfactorily appears that it is necessary that a Guardian ad Litem be appointed for Heather Jo Krueger, and that said Annette L. Gerhardt is a proper, competent and responsible person to act as such Guardian ad Litem, and the Court being fully advised in the premises.

IT IS ORDERED that Annette L. Gerhardt be, and she hereby is appointed Guardian ad Litem for said minor, and authorized to commence an action in behalf of said minor.

Dated this 20th day of November, 1984.

BY THE COURT:

/s/ R. F. Curtis
Acting Circuit Judge—Br. 2

STATE OF WISCONSIN
CIRCUIT COURT
SAUK COUNTY

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84 CV574

ANNETTE L. GERHARDT, AS
GUARDIAN AD LITEM FOR
HEATHER JO KRUEGER,
Petitioner,

vs.

ARLEN LEE MOORE.
Respondent.

[Filed Nov. 20, 1984]

PETITION TO COMPEL SUPPORT

1. The petitioner, Annette L. Gerhardt, maintains law offices, Conway, Conway & Gerhardt, S.C., at 121 Fifth Street, Baraboo, WI., and is the Guardian ad Litem for Heather Jo Krueger, born September 7, 1969, who currently resides at 115 Ninth Avenue, in the City of Baraboo, County of Sauk, Wisconsin 53913; she is by occupation a student and has Social Security Number 396-68-9163.

2. The respondent, Arlen Lee Moore, whose birthdate is September 7, 1949, currently resides at Route 2, Sun Prairie, County of Dane, Wisconsin. The respondent's occupation and Social Security number is unknown to the petitioner.

3. The respondent is the natural father of Heather Jo Krueger, pursuant to a Judgment dated October 27, 1970, and entered in Dane County, a certified copy of which is on file in Sauk County.

4. The respondent has not paid any amount for the support of Heather Jo Krueger since November 1, 1974.

PETITIONER REQUESTS AN ORDER:

1. Requiring the respondent to pay 17% of his gross income from November 1, 1974, for the past, present and future support of the minor child, Heather Jo Krueger.

2. Requiring the respondent to provide comprehensive hospitalization and medical health insurance for the benefit of said child, and requiring him to pay 50% of all uninsured hospital, medical, optical, dental, pharmaceutical and other like expenses for said child.

3. Requiring the respondent to maintain an appropriate policy of life insurance, with the said minor child named as the irrevocable primary beneficiary thereon.

Dated this 16 day of November, 1984.

CONWAY, CONWAY & GERHARDT, S.C.

/s/ Annette L. Gerhardt
ANNETTE L. GERHARDT

Office and Post Office Address:

CONWAY, CONWAY & GERHARDT, S.C.
121 Fifth Street
Baraboo, WI. 53913
(608) 356-9441

STATE OF WISCONSIN
CIRCUIT COURT
SAUK COUNTY

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84 CV574

ANNETTE L. GERHARDT, AS
GUARDIAN AD LITEM FOR
HEATHER JO KRUEGER,
Petitioner,

vs.

ARLEN LEE MOORE.
Respondent.

[Filed Nov. 20, 1984]

ORDER TO SHOW CAUSE FOR
TEMPORARY ORDER

Upon the attached Affidavit of the petitioner:

IT IS HEREBY ORDERED that the above-named respondent show cause in person before the Honorable John U. Dithmar, Family Court Commissioner for Sauk County, at his offices at 425 Oak Street, Baraboo, WI. on the 30th day of November, 1984, at 3:30 P.M. why an Order should not be entered pending judgment in this action for the relief requested in the attached Affidavit.

IT IS FURTHER ORDERED that pending the hearing on this order:

1. The petitioner shall produce financial information regarding Betty Lou Krueger, the natural mother of

Heather Jo Krueger, and the respondent shall also produce financial information, consisting of wage statements from the respective employers for a period of eight weeks prior to said hearing, a preliminary financial statement under oath, and copies of state and federal income tax returns for the last two taxable years.

2. A conformed copy of this order together with the supporting papers shall be served upon the respondent in person at least 48 hours before the time fixed for said hearing.

Dated at Baraboo, Wisconsin, this 20 day of November, 1984.

/s/ John U. Dithmar
Sauk County
Family Court Commissioner

STATE OF WISCONSIN
CIRCUIT COURT
SAUK COUNTY

ANNETTE L. GERHARDT, AS
GUARDIAN AD LITEM FOR
HEATHER JO KRUEGER,
Petitioner,

VS.

ARLEN LEE MOORE.
Respondent.

AFFIDAVIT

STATE OF WISCONSIN)
) ss.
COUNTY OF SAUK)

Annette L. Gerhardt, being first duly sworn on oath states as follows:

1. I am the petitioner in the above-entitled action, acting as Guardian ad Litem on behalf of Heather Jo Krueger, to compel support and I maintain law offices, Conway, Conway & Gerhardt, S.C., at 121 Fifth Street, Baraboo, WI. 53913, and said minor child, Heather Jo Krueger resides with her natural mother, Betty Lou Krueger, at 115 Ninth Avenue, Baraboo, Sauk County, Wisconsin.

2. Said minor child, Heather Jo Krueger, was born September 7, 1969.

3. The respondent is the natural father of said child.

4. Upon information and belief, the respondent has not paid any amount for the support of said minor child since November 1, 1974.

WHEREFORE, I request that a hearing be held and a temporary order be entered pursuant to the provisions of s. 767.23(1)(a), Wis. Stats., as follows:

1. Requiring the respondent to pay support for the minor child.

2. Requiring the respondent to maintain comprehensive hospitalization and medical health insurance for the benefit of said minor child, and requiring him to pay 50% of all uninsured hospital, medical, dental, optical, pharmaceutical and other like expenses for said minor child.

3. Requiring the respondent to maintain an appropriate policy of life insurance, with the minor child named as the irrevocable primary beneficiary thereon.

4. For such other and further relief as the Court or Family Court Commissioner deems just and reasonable in the circumstances.

/s/ Annette L. Gerhardt

Subscribed and sworn to before me
this 19 day of November, 1984.

/s/ SUSAN A. SPRECHER
Notary Public, Sauk County, Wisconsin.
My commission expires October 5, 1986.

No. 187 Temporary Hearing Fact Sheet
Revised 6-80 ATB Forms, LL Loan. Ed

Wisconsin Legal Blank Co., Inc.
Milwaukee, WI

State of Wisconsin : Family Court Branch : Sauk County

FAMILY COURT COMMISSIONER

Annette L. Gerhardt, Guardian
ad Litem for Heather Jo Krueger

(Petitioner) A Minor
~~(Joint Petitioners)~~

- vs

Arlen Lee Moore

(Respondent)

Case No. 84CV574

TEMPORARY HEARING
FACT SHEET

NOTE: THIS STATEMENT MUST BE FILED WITH THE FAMILY COURT COMMISSIONER BEFORE OR AT THE TIME OF THE HEARING. FAILURE BY EITHER PARTY TO COMPLETE, PRESENT, AND FILE THIS FORM AS REQUIRED WILL AUTHORIZE THE COURT OR HEARING OFFICER TO ACCEPT THE STATEMENT OF THE OTHER PARTY AS THE BASIS FOR ITS DECISION. ANY FALSE STATEMENT MADE HEREON SHALL SUBJECT YOU TO THE PENALTY FOR PERJURY AND MAY BE CONSIDERED A FRAUD UPON THE COURT

~~Husband~~:	Arlen Lee Moore	~~Wife~~:	Betty Krueger (Mother)
Address:	Route 2 Sun Prairie, WI	Address:	115 Ninth Avenue Barabob, WI 53913
Soc. Sec. No.:		Soc. Sec. No.:	396-68-9163
Birthdate:	_____ Age: _____	Birthdate:	_____ Age: _____
Employer:		Employer:	Weickgenant Accounting, Inc.
Occupation:		Occupation:	Receptionist
Attorney:	Gary Alan Hebl	Attorney:	Annette L. Gerhardt
Firm:	HEBL, HEBL & DESMOND	Firm:	CONWAY, CONWAY & GERHARDT, S. C.

Children:	Date of Birth:	Age:
Heather Jo Krueger	9/7/69	15

Date of Filing Summons: _____
Date of Service of Summons: _____
Date of Separation: _____
With whom are children living: _____

I. INCOME

(Attach copies of wage statements from your last four weeks earnings)

A. GROSS MONTHLY INCOME: (Multiply weekly income by 4.3 and bi-weekly income by 2.15)

Other: (AFDC, Social Security, Pensions, Disability, Unemployment, Interest, Dividends, Rents, Child Support from prior marriage, etc.) (Please circle source of income)

	Husband	Wife
		50.00
		860.00
TOTAL		910.00

B. DEDUCTIONS

Taxes		
Social Security		153.45
Insurance		
Union dues		
Retirement		
Credit Union		
Other		
TOTAL		153.45

C. NET MONTHLY INCOME

	756.55

II. MONTHLY EXPENSES

Rent or Mortgage (taxes and insurance) (if rent included)	188.50
Food	100.00
Utilities	100.00
Telephone	25.00
Clothing	50.00
Laundry Dryer's broken now	5.00
Medical (No health insurance)	25.00
Dental	20.00
Insurance (exclude payroll deductions) Life, auto	17.00
Child Care	- 0 -
Auto Expense	50.00
Auto Payments	78.00
Debts (Enter total from III Debts)	100.00
Miscellaneous Lessons for Heather	15.00
Miscellaneous	10.00
	983.50

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H . Husband
W . Wife
J . Joint
C . Children

III. DEBTS

Creditor	Purpose	Original Amount	Balance	Monthly Payment
Wisconsin Finance	Car Loan	2,808.00	1,744.00	78.00
Spurgeons	Charge		178.39	20.00
~~Prudential Insurance~~	~~Loan (2)~~	~~253.14 & 889.36~~	~~Same~~	~~5.00 (Interest~~
Sauk Prairie Clinic	Med. Care/Tests	145.30	125.30	20.00
Sauk Prairie Hospital	" " "	100.00	100.00	10.00
~~Medical Associates~~	" " "	~~78.60~~	~~82.00~~	~~---~~
Baraboo Housing Auth.	House Improve.	2,000.00	2,000.00	No payments un house sold
Agnes Trussell	Loan	500.00	460.00	20.00
~~Dr. Grady~~	~~Braces~~	~~1,400.00~~	~~595.00~~	~~25.00~~

TOTAL 178.00

IV. ASSETS

A. REAL ESTATE If space is insufficient, attach separate schedule

Address	Appraised Value	Mortgage or Lien	Net Value
115 Ninth Avenue, Baraboo	43,250.00	30,450.00	12,800.00
(Owe 1983 taxes)			

B. MOTOR VEHICLES

Type	Present Value	Mortgage or Lien	Who Uses
1975 Hornet Wagon	500.00	1,744.00	Betty Krueger

C. CASH AND DEPOSIT ACCOUNTS

Bank or Savings & Loan	Type	Amount
Heather @ Baraboo National	Savings	13.78
Betty @ Baraboo National	Checking	40.00

D. LIFE INSURANCE

Company	Premiums	Face Amount	Beneficiaries	Type Policy	Cash Value
Prudential		2,000.00	Heather	20 year	---
	5.65	1,000.00	"	" "	"
		1,000.00	"	" "	Loan against it

2 Policies on Heather — Betty — - 0 -

E. RETIREMENT ANNUITIES OR PROFIT SHARING ACCOUNTS

$50.00 IRA

F. STOCKS & SECURITIES (List name, number of shares and value).

Household Finance - 2 shares - $40.00

G. OTHER ASSETS: (Include valuable collections such as coins, stamps, guns, sporting and other equipment, mortgages or notes receivable, interests in Trusts, wills, contract rights, judgments, livestock and pets)

None

H. HOUSEHOLD FURNITURE, FURNISHINGS & APPLIANCES — PRESENT VALUE 2,000.00

37a

Subscribed and sworn to before me this 13rd day of ~~January~~ March 1985.

Notary public, state of Wisconsin

My commission ~~expires~~ is permanent.

(Party's Signature)
Betty Krueger

17

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Supreme Court, U.S.
FILED
FEB 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1103

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ANNETTE L. GERHARDT, AS GUARDIAN AD LITEM FOR HEATHER J. KRUEGER,

Petitioner,

v.

ESTATE OF ARLEN LEE MOORE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF THE QUESTIONS PRESENTED

1. Whether a court-approved settlement reached in 1970 in a paternity proceeding, which was entered into pursuant to statutory direction by an illegitimate child's mother, father and the district attorney—whereby the father admitted paternity and made a lump-sum payment for child support and birthing expenses—is *res judicata* as to an action commenced by the child fourteen years later to modify the support which had been agreed-upon and paid pursuant to the settlement?

2. Whether Wisconsin's former statutory scheme for paternity proceedings (repealed effective 1981) denied illegitimate children equal protection because it allowed the parties to a paternity action to reach settlements pursuant to which the illegitimate child's support needs to the age of eighteen could be satisfied either by lump-sum payment or by periodic payments in that election of the lump-sum payment alternative shortened the period during which modification of the agreement could later be sought?

LIST OF PARTIES

The caption contains the correct names of all the parties in the proceedings below.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The Wisconsin Supreme Court's decision is reported as *Gerhardt v. Estate of Moore*, 139 Wis. 2d 833, 407 N.W.2d 895 (1987), and is printed in petitioner's Appendix.

JURISDICTION

Jurisdiction appears to be appropriate under 28 U.S.C. § 1257(3) (1982). However, a substantial federal question would not be present if the Court concludes that the equal protection issue posited by petitioner need not be reached because dismissal of the action below was correctly affirmed by the Wisconsin Supreme Court on the basis of *res judicata*.

RELEVANT STATUTES

Wis. Stat. § 52.28

52.28 **Settlement agreements.** A woman who has borne a child out of wedlock or who is pregnant with a child which is likely to be born, out of wedlock, may enter into an agreement with the person claimed by her to be the father of the child. Such agreement may be entered into at any time prior to final judgment, either before or after issuance of process, or at any time while said judgment is still in effect. No agreement shall be entered into before the birth of the child unless the court finds that there are special circumstances making it advisable to do so. The agreement shall include a determination of all facts and orders which s. 52.37 requires the court to determine in its order for judgment, except that where the parties are unable to agree as to the paternity of the child, the alleged father may deny paternity in the agreement. By the terms of the agreement the defendant must submit personally to the jurisdiction of the court, and consent to entry of judgment in accordance with the terms of the agreement. Upon motion of the district attorney, the judge of a court of record having power to enter final

judgment in paternity proceedings, being satisfied with the terms of the agreement, shall order judgment in accordance therewith if paternity of the child is admitted. Where the paternity of the child is not admitted, after said agreement is approved by the court, it shall be filed but judgment shall not be rendered until there is a default of the payments agreed upon, when, upon motion of the district attorney, judgment shall be rendered and entered forthwith. All agreements referred to in ss. 52.21 to 52.45 shall be drawn by the district attorney. No other agreement or settlement of any paternity proceeding shall be valid.

Wis. Stat. § 52.29

52.29 **Agreement by district attorney.** In all cases where the mother commences any proceedings under this chapter and fails to prosecute the same, or where she has been delivered of a child born out of wedlock which is likely to become a public charge or shall be pregnant with a child likely to be born out of wedlock and to become a public charge, the district attorney of the county in which she resides shall have power to make an agreement with the putative father in the same manner and with the same force and effect as might be made by the mother.

Wis. Stat. § 52.37

52.37 **Judgment.** (1) If the defendant is found the father of the child, or admits the truth of the allegation, or enters into a settlement agreement, he shall be adjudged to be the father of such child, unless paternity is denied in such settlement agreement, and shall be ordered to pay all expenses incurred for lying-in and attendance of the mother during pregnancy, and also for the past care and support of the child, from the time of its birth until the date of the approval of the agreement or the entry of judgment. If the child is dead at the time of trial he shall pay the expenses of the funeral and the expenses of the last illness. All payments and expenses stated herein shall be paid by the accused to a trustee, and the settlement

agreement or judgment shall specifically provide for the amount of disbursement and indicate the person to whom the trustee shall make such disbursement.

(2) The defendant shall also pay to the county the costs of the action and is chargeable for the future support of the child until it attains the age of 18 years. Payments for such future support shall be directed to be made in either of the 2 following methods:

(a) Payment of a specified monthly sum until the child is 18 years of age;

(b) Payment of a specified lump sum to be paid upon the approval of an agreement or entry of judgment, or in specified minimum monthly instalments and other necessary instalments within 4 years following a period of 30 days after the date of such approval or entry of judgment, subject to the condition that upon default in any monthly instalment, the court reserves the right to require the defendant to pay monthly support money for the child until it attains the age of 18 years. All payments for the future support of the child shall be paid to a trustee and shall be held by him for the benefit of the child, subject to the order of the court, and shall be paid by him to the person, agency or institution having legal custody of the child in such manner and amounts as the court directs.

(3) All of the foregoing matters shall be ascertained and fixed by the court and, together with such attorneys' fees as have been allowed, shall be inserted in the judgment, with an order directed to the clerk of the court to file with the state registrar of vital statistics a certified copy of all judgments determining the paternity of the child, and a report showing the name, date and place of birth of the child and the name, color, residence, age, birthplace and occupation of the father of the child. The registrar shall thereupon issue a new certificate, pursuant to and in accordance with the judgment of the court. Such new certificate shall be issued substantially in accordance with the provisions of ss. 69.33 and 69.24 (1) (e) and the clerk of the court shall collect a fee of $1 which shall be

transmitted to the bureau of vital statistics. Judgments entered upon agreement of the parties shall conform to the above unless the parties are unable to agree as to the paternity of the child, when such adjudication may be omitted.

(4) All such judgments shall be satisfied of record by the clerk on payment to him of the costs and the filing of satisfaction of judgment executed and acknowledged by the complainant and trustee, if a trustee be appointed, and whenever ordered so to do by a written order of the court.

Wis. Stat. § 52.38

52.38 Continuing jurisdiction; revision of judgment or agreement. (1) Whenever settlement has been made pursuant to s. 52.37 and the defendant fails to comply with the terms of such settlement, or whenever the judgment or agreement providing for the monthly support of a child born out of wedlock has been docketed or filed, the court shall have continuing jurisdiction and may, on the petition of the district attorney, the trustee, the mother, the named or adjudicated father, or any other person, agency or institution having legal custody of the child or upon stipulation signed by the defendant and the person, agency or institution having legal custody of the child and approved by the district attorney, revise and alter such judgment or agreement respecting the amount of support and the payment thereof and in its discretion may provide for or increase or decrease the amount of future support, and may make such further judgment or order as the circumstances of the parties require.

(2) Whenever a petition is brought to the court as hereinabove set forth, the district attorney, the defendant, and the person, agency or institution having legal custody of the child, must be served with a copy of the petition at least 10 days before the date set for the hearing.

(3) Nothing in this section shall in any way be considered a derogation of s. 52.05.

STATEMENT OF THE CASE

The decision of the Wisconsin Supreme Court contains an accurate and complete statement of the case which, for purposes of this brief, Respondent adopts and incorporates by reference.

SUMMARY OF THE STATUTORY SCHEME AT ISSUE

Wisconsin's former statutory scheme for paternity proceedings (Chapter 52, Wis. Stats. [1967], replaced and superseded by Chapter 767, Wis. Stats. [1981]) permitted parties to reach a court-approved settlement short of trial pursuant to which the illegitimate child's support needs could be met either by lump-sum payment or by periodic payments. The criteria for determining the appropriate amount of total support was identical for both payment options, focusing on the illegitimate child's need for support until the age of eighteen. Wis. Stat. § 52.37(2).

The so-called "lump-sum payment" alternative could be made in a single payment or, as occurred in this case, through monthly installments spread over a period of up to four years. Wis. Stat. § 52.37(2). The lump-sum option was subject to the condition that, upon default in any monthly installment, the court could order the father to convert to the periodic payment alternative. Wis. Stat. § 52.37(2)(b).

Significantly, regardless of which payment option was employed, the judgment remained unsatisfied of record

and was subject to modification until such time as the father made all required payments. Wis. Stat. §§ 52.37(4) and 52.38(1). The father was entitled to entry of a satisfaction of judgment only upon making all payments called for pursuant to the particular payment option selected by the parties. Wis. Stat. § 52.37(4). In the present case, the father satisfied his obligations under the stipulated judgment by making timely payment of his monthly installments over four years.

REASONS FOR DENYING CERTIORARI

I.

EQUAL PROTECTION IS NOT VIOLATED BY AFFORDING AN ADDITIONAL, OPTIONAL PAYMENT METHOD FOR SATISFYING SUPPORT OBLIGATIONS TO ILLEGITIMATE CHILDREN.

Petitioner urges the Court to expand equal protection analysis far beyond any of the Court's prior holdings. Petitioner contends that Wisconsin's former statutory scheme for paternity proceedings denied illegitimate children equal protection because it gave them *too much*, not too little!

Wisconsin's former paternity statutes undeniably provided illegitimate children with the same procedural rights and substantive entitlements to support afforded legitimate children in non-paternity proceedings. The problem, according to petitioner, is that the statutes permitted an *additional, alternative* method by which fathers could satisfy their support obligations to illegitimate children in the context of a paternity proceeding—namely, through lump-sum payments—which was unavailable for support

of legitimate children in non-paternity proceedings. Petitioner reasons that affording the lump-sum payment *alternative* discriminated against illegitimate children because, as to those illegitimate children for whom the option was accepted, it resulted in a shorter period for seeking future modification than that enjoyed by those illegitimate children and legitimate children whose support needs were provided for through periodic payments.[1]

The Wisconsin Supreme Court was correct in its conclusion that "[a] child born out of wedlock is not denied equal protection simply because the statutes provide an additional, optional method for satisfying a support obligation" (Decision, petitioner's App. at 11a). Research fails to disclose any authority for petitioner's novel theory that a protected class is denied equal protection by a statutory scheme which grants the protected class a purely optional procedure *in addition to* the procedures available to the non-protected class. Moreover, even if, *arguendo*, the challenged statutory scheme were deemed to create a classification warranting constitutional scrutiny, it would pass muster under this Court's holdings as explained below because the distinction is reasonably related to Wisconsin's legitimate state interest in promoting settlements and according finality to paternity judgments.

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[1] Petitioner also makes much of the fact that the illegitimate child in this case was not represented by a *guardian ad litem* at the time the settlement agreement was entered into in 1970. Petitioner's argument is without constitutional significance. As noted below by the Wisconsin Supreme Court, *guardians* are seldom appointed in connection with settlements involving support for legitimate or illegitimate children (Decision, petitioner's App. at 7a). In such proceedings, it has always been the practice for the custodial parent to speak for the child. *Id.*

II.

THE WISCONSIN SUPREME COURT'S DECISION IS CONSISTENT WITH THIS COURT'S PRIOR DECISIONS REGARDING EQUAL PROTECTION AND THE RIGHTS OF ILLEGITIMATE CHILDREN.

This Court has issued a substantial body of decisions applying equal protection analysis to state statutory schemes affecting the rights of illegitimate children.[2] The Court's decisions have focused on two areas—statutes limiting inheritance by illegitimate children and statutes prescribing short limitations periods on commencement of paternity proceedings. *Compare Mills, supra* (striking Texas' one-year limitation period on commencing paternity actions) *with Trimble, supra* (striking Illinois statute barring illegitimate children from inheriting from father's estate). The starting point in the Court's equal protection analysis in these cases is clear:

> [A] state may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally.

Gomez v. Perez, 409 U.S. 535, 538 (1973).

As reflected in this Court's prior decisions on the subject, articulation of the general rule (quoted above from *Gomez*) does little to advance the analysis as to whether a particular statutory scheme accords equal protection to

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[2] In *Trimble v. Gordon*, 430 U.S. 763, 767 n. 11 (1977), the Court noted that it had addressed twelve such cases since 1968 alone. A number of significant additional decisions have followed. *See Reed v. Campbell*, ____ U.S. ____, 106 S. Ct. 2234 (1986); *Pickett v. Brown*, 462 U.S. 1 (1983); *Mills v. Habluetzel*, 456 U.S. 91 (1982). Indeed, the Court just accepted certiorari of a case involving the constitutionality of a Pennsylvania statute which imposes a six-year limitation period on commencement of paternity proceedings. *Clark v. Jeter*, No. 87-5565 (cert. granted, January 12, 1988).

illegitimate children. This is particularly true in the present case because the Wisconsin paternity statutes at issue here do not fall squarely into either of the two areas covered by the Court's prior rulings.

The constitutional inquiry starts with the applicable level of scrutiny. A classification based on illegitimacy is not "suspect" so as to require that it survive "strict scrutiny." *Mathews v. Lucas*, 427 U.S. 495, 506 (1976). A classification based on illegitimacy is permissible provided that it bears "some rational relationship to a legitimate state purpose." *Trimble*, 430 U.S. at 763, *quoting Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972). Stated another way, equal protection is satisfied unless the state's distinction is "mindless and patently irrational." *Trimble*, 430 U.S. at 787 (Rehnquist, J., dissenting).

In determining whether the Wisconsin paternity statutes at issue here bear some rational relationship to a legitimate state purpose, it is important to bear in mind this Court's repeated observation that "the lurking problems with respect to proof of paternity . . . are not to be lightly brushed aside. . . ." *Gomez*, 409 U.S. at 538, *quoted with approval, e.g., Mills v. Habluetzel*, 456 U.S. at 94. The Court has also recognized the need for states to draw "arbitrary lines . . . to facilitate potentially difficult problems of proof." *Weber*, 406 U.S. at 174.

Because of the problems associated with proof of paternity, the Court has held that equal protection does not mandate that states adopt support procedures for illegitimate children which are identical to those afforded legitimate children:

> The fact that Texas must provide illegitimate children with a bona fide opportunity to obtain paternal support does not mean, however, that it must adopt pro-

> cedures for illegitimate children that are coterminous with those accorded legitimate children. Paternal support suits on behalf of illegitimate children contain an element that such suits for legitimate children do not contain: proof of paternity. Such proof is often sketchy and strongly contested, frequently turning upon conflicting testimony from only two witnesses. Indeed, the problems of proving paternity have been recognized repeatedly by this court. [Citations omitted]
>
> . . .
>
> Therefore, in support suits by illegitimate children more than in support suits by legitimate children, the State has an interest in preventing the prosecution of stale or fraudulent claims and may impose greater restrictions on the former than it imposes on the latter. Such restrictions will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest. [Citations omitted]

Mills, 456 U.S. at 97-100.[3]

The Court's above-quoted comments from *Mills* are particularly pertinent here. The payment procedures used to provide support to illegitimate children pursuant to paternity proceedings and those used for legitimate children pursuant to other actions affecting the family are not, and, according to *Mills*, need not be, coterminous because the two situations are no more comparable for purposes of equal protection analysis than "apples and oranges".

In the typical divorce or separation action involving support for a legitimate child, the issues are limited to the parents' ability to pay and the needs of the child. In a paternity proceeding, by contrast, the foundation issue is

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[3] Interestingly, the Texas paternity statute at issue in *Mills* also permitted lump-sum support payments to be made in lieu of periodic payments, a fact the Court noted without criticism. 456 U.S. at 95.

proof of paternity—a failure on that issue bars the child from any support whatsoever. The risk of losing at trial on the paternity issue is significant and cannot, as this Court has repeatedly noted, "be lightly brushed aside." *Gomez*, 409 U.S. at 538. *Accord, Mills*, 456 at 94.

III.

THE STATUTORY SCHEME AT ISSUE IS REASONABLY RELATED TO WISCONSIN'S LEGITIMATE STATE INTEREST IN PROMOTING SETTLEMENTS AND ACCORDING FINALITY TO PATERNITY JUDGMENTS.

The statutory scheme at issue here advances several legitimate state interests. First, to the extent that the availability of the lump-sum payment alternative promotes settlement by offering the parties a better alternative than may result to one side or the other should the matter go to trial, it reduces litigation and the resultant burden on the state court system. It also reduces the number of illegitimate children who obtain no support whatsoever because of failure of proof on the paternity issue at trial which, in turn, adds to the burden on the state's welfare system. Moreover, it should not be overlooked that Wisconsin designed the statutory procedure for paternity settlements to promote not only the public interest but also the interest of the illegitimate child. *See Decision*, petitioner's App. at 8a, *citing Smazal v. Estate of Dassow*, 23 Wis. 2d 336, 340, 127 N.W.2d 234 (1964).

Petitioner's position also ignores the nature of compromise and the strong public policy supporting it. As the Wisconsin Supreme Court reasoned in this case:

> Implicit in the provision of a mechanism for paternity settlement is the recognition that parties will accept a settlement which does not provide for the full support of the child until the age of 18. A settlement,

> by its very nature, involves concessions by each party in an attempt to resolve the dispute without additional litigation. In reaching settlements, the parties balance a number of competing interests, including the issue of paternity itself, the possibility of the father's absence by death or departure, the present financial position and the future income potential of the father, and present and future living expenses. Because many of these considerations are not predictable with any particularity, a lump-sum settlement tends to be only an estimate which may, in hindsight, appear to be inadequate. However, where paternity is denied and the issue must go to trial, a settlement agreement may be a reasonable compromise.

In the present case, it is impossible to theorize what may or may not have happened but for the settlement. It is not unreasonable to assume that, if the lump-sum payment had not been a condition to the admission of paternity, the respondent may have chosen to contest the paternity issue. Had the respondent prevailed, the illegitimate child would have been foreclosed without any support whatsoever.

The settlement agreement in this case expressly provided that "this agreement and full and complete performance thereof, shall constitute full and final settlement" (Petitioner's App. at 27a). The lump-sum payment was the inducement for the respondent to admit paternity. It would be grossly unfair to permit the petitioner to proceed now for additional support based upon the father's admission of paternity when the lump-sum payment was the inducement for the admission of paternity fifteen years earlier.

Petitioner seeks to retain all the benefits of the compromise without any of its burdens or limitations. The

trial court noted the problems with the result advocated by petitioner:

> In closing, the court would point out that the petitioner in this case is happy to accept respondent's admission of paternity and the money that he has paid as a result of that admission. If the statute is unconstitutional for all purposes, as the petitioner contends, it would seem to the court that the admission of paternity, having been made presumably to obtain the advantage of a lump-sum settlement, would have to be vacated. It would likewise seem that any and all monies paid by the respondent to Heather's mother would have to be returned to the respondent, with interest, and then this proceeding could commence. The court cannot conceive that the Supreme Court contemplated that such a situation should develop.

Petitioner's App. at 20a-21a.

Moreover, it should be noted that the passage of time has, for practical reasons, made it impossible to vacate the judgment and return the parties to their original position prior to the settlement. Respondent is now deceased (*see* Petition at 7 n. 4), so it would be impossible to now litigate the question of paternity which had been avoided in 1970 by virtue of the settlement agreement.

Wisconsin's former paternity statutes pass constitutional muster under this Court's precedents because the statutes were reasonably related to Wisconsin's legitimate state interest in promoting settlement and according finality to paternity judgments. Wisconsin's distinction is "not mindless and patently irrational". *Trimble*, 430 U.S. at 787. Nor, are the justifications underlying Wisconsin's classification any less reasonable than those advanced for the statutes upheld by the Court in other cases. *See, e.g., Matthews v. Lucas*, 427 U.S. at 496.

IV.

THIS CASE IS NOT A GOOD VEHICLE FOR ADVANCING THE COURT'S LAW-DEVELOPMENT FUNCTION.

For a variety of reasons, this case is not a good vehicle for advancing the Court's law-development function. First and foremost, the Wisconsin statutory scheme in question was repealed and replaced effective 1981. Research fails to disclose the existence of any similar statutory schemes now in effect in other states.

Second, the statutes involved in the state court decisions cited in the petition are readily distinguishable from Wisconsin's former paternity statutes. Each of the cases cited by petitioner rises and falls on its own unique statutory scheme and the public policies relied upon by each state to support the particular classifications. The other decisions do not involve analogous lump-sum payment provisions. Review of the present case would result in a decision having little precedential value in Wisconsin (to anyone other than petitioner) and would not be a suitable vehicle for offering more general guidance to other states.

Finally, death of the respondent father also clouds the utility of any further decision in this case. For example, were the Court to accept review and hold that the statutory scheme was unconstitutional, the Court would be left to wrestle with the awkward question of whether and how the resurrected issue of paternity should be litigated.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent

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APPENDIX

STATE OF WISCONSIN | COUNTY COURT BRANCH III | DANE COUNTY

STATE OF WISCONSIN,	)	
	)	
Plaintiff,	)	
	)	
by BETTY LOU KRUEGER,	)	
	)	
Complainant,	)	FINDINGS AND
	)	
vs.	)	JUDGMENT
	)	
ARLEN LEE MOORE,	)	
	)	
Defendant.	)	

The parties to this action on the [illegible] day of February, 1970, entered into a written agreement of settlement wherein the defendant consented to entry of judgment pursuant to the terms of the said agreement and the law applicable thereto. The said agreement having been duly approved and ordered filed;

NOW, on motion of ANDREW [illegible], Assistant District Attorney for Dane County, it is

FOUND AND ADJUDGED

1. That on the 7th day of September, 1969, the complainant gave birth to a female child, since named Heather Jo Krueger; that said child was born out of wedlock in Madison, Wisconsin; that the defendant is the father of said child; that the defendant is a resident of Dane County, Wisconsin.

2. That the defendant is ordered to contribute to the future support and maintenance of said child in the following manner: The defendant shall pay to the Clerk of County Court, Branch III, for Dane County, as Trustee, the sum of $75.00 per month on or before the 1st day of each month, beginning on the 1st day of [illegible], 1970, and a like amount of $75.00 on the 1st day of each month thereafter for a period of 17 months making a total payment of $3,600.00. Defendant shall further pay to Sauk County, Wisconsin, the sum of $1,000.00 for medical reimbursement paid on behalf of the complainant at the rate of $20.00 per month for 50 months, beginning [illegible] 1970.

11/4/70 — Certified copy sent to S.B.V.S. Check #44233.

3. That the Clerk of County Court, Branch III, for Dane County, will act as Trustee, for the collection of funds paid under the terms of this agreement; and that all such funds so collected by said Clerk as Trustee, as support funds will be paid over to the complainant, Betty Lou Krueger. And also that the $20.00 per month for medical reimbursement be paid to the County Treasurer's Office of Sauk County, at Baraboo, Wisconsin.

4. That the Clerk of County Court, Branch III, is hereby ordered and directed to file with the State Registrar of Vital Statistics, a certified copy of this Judgment with the following information concerning the defendant:

Name: Arlen Lee Moore

Race: White

Age: 21 now, 20 on Sept. 7, 1969

Residence: 1010 Gilson St., Madison

Occupation: Chemical Technician

5. That the defendant shall pay to the Clerk of County Court, Branch III, the cost and disbursements of this action; and shall also pay to the Clerk of said Court the sum of Two ($2.00) dollars as a fee for the transmission of a certified copy of this judgment to the State Registrar of Vital Statistics.

6. That the defendant, not having given bond to Dane County in accordance with Section 52.39, Wisconsin Statutes, 1967, hereby is committed to the County Jail until he shall comply with this Judgment or shall otherwise be discharged according to law; the Court, however, stays execution of the aforesaid committment, and said execution of committment so stayed shall issue at any time when it shall appear to the Court that the defendant has defaulted on any of the provisions of this judgment.

Dated this 27th day of October, 1970.

/s/ RUSSELL J. MITTELSTADT

Judge

County Court, Branch
Dane County, Wisconsin

87-1103

Supreme Court, U.S.
FILED
JAN 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ANNETTE L. GERHARDT,
as Guardian ad Litem
for HEATHER JO KRUEGER,

Petitioner,

v.

ESTATE OF ARLEN LEE MOORE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

BRIEF OF AMICUS CURIAE STATE OF WISCONSIN

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QUESTION PRESENTED

Is a child denied equal protection of the laws and due process of law by a state court decision that bars her from seeking ongoing support from her natural father because her mother entered into a lump-sum child support settlement pursuant to a state statute that permitted such settlements only if the child is illegitimate?

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

ANNETTE L. GERHARDT,
as Guardian ad Litem
for HEATHER JO KRUEGER,

Petitioner,

v.

ESTATE OF ARLEN LEE MOORE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

BRIEF OF AMICUS CURIAE
STATE OF WISCONSIN

INTEREST OF AMICUS CURIAE
STATE OF WISCONSIN

Section 46.25(1) of the Wisconsin Statutes creates a "child and spousal support and establishment of paternity and medical liability support program" in the Wisconsin Department of Health and

Social Services (hereafter "department"). The purpose of this program, among other things, is to establish paternity when possible and to enforce support obligations owed by parents to their children. To accomplish the objectives of this program and of other public assistance programs, county and state agencies are directed to cooperate with one another to implement a child and spousal support and paternity establishment program in accordance with state and federal laws, regulations and rules (Amicus App. 2).

(Section 46.25 is reprinted in full in the appendix to this brief which is hereafter designated (Amicus App. ____.) All other appendix references designated as (App. _____) refer to the appendix to the Petition for Writ of Certiorari.)

The State of Wisconsin through the Department of Health and Social Services, Office of Child Support Enforcement, may represent the state or any individual in any action to establish paternity or to establish or enforce a support obligation under section 46.25(7). The department may delegate its authority to so represent the state or any individual to the district attorney or corporation counsel. Under subsection (9) the department also is required to adopt and publish a standard for courts to use in determining a child support obligation based upon a percentage of the gross income and assets of either or both parents.

Under sec. 46.25, Wis. Stats., and other related provisions, the department has an oversight responsibility within the child support program to fairly

insure the protection of the interests of all parties, including an absent party such as a child whose interests were not represented by any party to an earlier agreement. Uniform enforcement of the child support program traditionally has required similar treatment of, and rights accorded to, marital and nonmarital children. It is the department's statutory duty, in cooperation with other state and county agencies, to assure access to the courts for resolution of child support disputes.

ARGUMENT

I. A CHILD IS DENIED EQUAL PROTECTION OF THE LAWS AND DUE PROCESS OF LAW BY A STATE COURT DECISION THAT BARS HER FROM SEEKING ONGOING SUPPORT FROM HER NATURAL FATHER BECAUSE HER MOTHER ENTERED INTO A LUMP-SUM CHILD SUPPORT SETTLEMENT PURSUANT TO A STATE STATUTE THAT PERMITTED SUCH SETTLEMENTS ONLY IF THE CHILD IS ILLEGITIMATE.

A. Any agreement or stipulation by a parent which prevents the trial court from reviewing support agreements for fairness and adequacy before approving them, and after judgment from time to time, revising and altering such judgments respecting the amount of child support to be paid, are invalid under Wisconsin law.

In distinguishing this case from In re Paternity of B.W.S., 131 Wis. 2d 301, 388 N.W.2d 615 (1986), the Court stated below that, unlike Wisconsin law, the

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"Michigan statutes and case law expressly provide that settlement agreements are binding only if the circuit court determines that the agreement makes adequate provision for the support and education of the child" (App. 9a-10a).

However, the Court has stated in several cases that the trial court has an independent obligation to review stipulations related to support for fairness. Helmbrecht v. St. Paul Fire Ins. Co., 122 Wis. 2d 94, 104 n.2, 362 N.W.2d 118 (1985); Conrad v. Conrad, 92 Wis. 2d 407, 415, 416, 284 N.W.2d 674 (1979); Leighton v. Leighton, 81 Wis. 2d 620, 629, 261 N.W.2d 457 (1978); Schmitz v. Schmitz, 70 Wis. 2d 882, 886-88, 236 N.W.2d 657 (1975); Ray v. Ray, 57 Wis. 2d 77, 84, 203 N.W.2d 724 (1973); Bliwas v. Bliwas, 47 Wis. 2d 635, 639, 178 N.W.2d 35

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(1970); and Miner v. Miner, 10 Wis. 2d 438, 443, 103 N.W.2d 4 (1960).

At the time the support agreement in this case was entered, the trial court was also subject to sec. 52.45, Wis. Stats. (1967) which provided that the relevant statutes "shall be so interpreted and construed as to effectuate the protection and welfare of the child involved in any proceedings hereunder."

The Court acknowledged in its opinion that "[t]he child's interest in receiving support, however, was not in which party provided support, but only that adequate support was provided" (App. 7a-8a). The court further stated that when a stipulation for support received Court approval, "then the child's interest has been adequately protected pursuant to the statute" (App. 8a).

In addition, it is generally recognized that where a divorce court has ordered one of the parties to provide for the support and maintenance of the children of the marriage, that allowance may, at any time after the decree has been rendered, be varied or modified on the application of either party. Annot., 61 A.L.R.3d 663 (1975), citing 24 Am. Jur. 2d Divorce and Separation § 844 (1984). For example, sec. 767.32, Wis. Stats., requires the court, upon a finding of a factual basis, to revise and alter judgments upon request.

The state contends that the child's interest is in the continued adequacy of the support and that this interest is to be protected by the trial court until the child reaches adulthood. The state further contends that the trial court's approval of the agreement in this case

cannot relieve the trial court of its duty to review the agreement for adequacy as circumstances change to modify that amount to meet the child's changed needs.

B. A child whose interests were not represented by any party to the agreement cannot have her rights derogated by the agreement.

1. There is no evidence that the mother represented the child's interests in negotiating this agreement.

The Court concluded that because the mother was a party and because her interests incorporated those of her child, there was an identity of interests between the mother and child. However, the Court did not acknowledge that pursuant to sec. 52.29, Wis. Stats. (1967) the district attorney had full

authority to enter into a support agreement with the father without the mother's consent and had full authority to decide whether to commence an action at all, State ex rel. Smith v. Chicks, 70 Wis. 2d 833, 235 N.W.2d 694 (1975).

Since this case proceeded on a Motion to Dismiss, there is no information in the record which would inform the Court whether this mother was formally or informally coerced into this agreement in order to persuade the district attorney to commence the action or to ensure that she received any support at all. However, since she had received public assistance during her pregnancy, she had no right to either commence the action or to pursue her own support action without the approval of the district attorney, secs. 52.22 and 52.29, Wis. Stats. (1967). Thus, to

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conclude that she was free to negotiate or litigate her child's rights to child support is simply unsupported by the relevant statutes or the record.

Absent this ability to independently negotiate or litigate the issue of child support, the child's interest in adequate child support could not be represented by the mother.

2. The district attorney did not represent the interests of the mother or child.

The Court further indicated that the state's interest in the level of child support is represented by the district attorney (App. 7a-8a). There were no facts of record as to the interests actually represented by the district attorney in this case.

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However, in 1970, the county paid the medical expenses. The state and federal governments shared most of the liability for future support of the child in the form of Aid to Families with Dependent Children. Thus, the district attorney's immediate concern was the reimbursement to his employer, the county, for the medical expenses of the child's birth and not the future financial support of the child. This is reflected in the settlement here, which fully covered the county's expenses and waived the child's future support.

In addition, the district attorney had the concern of saving time and money for the county by settling cases. This immediate concern is unrelated to the adequacy of the child's future support. Also, paternity cases had such low priority for district attorneys during

this time that such actions were not even listed separately on the official statement of the district attorney duties in sec. 59.47, Wis. Stats. (1967).

The district attorney had no obligation to represent the mother in this proceeding, even though she had no right to obtain private counsel to prosecute the case and even though any support agreement could be dictated by the district attorney, without agreement of the mother. For the same reasons that the Court held that the district attorney did not represent the interests of the child in deciding whether to bring a paternity action, it is the state's contention that the district attorney did not represent the interests of the child in seeing to it that they receive adequate support.

Given this multitude of conflicting interests and disincentives affecting the role of the district attorney, it is the state's contention that the district attorney did not have the authority to waive the child's right to support from her parent for the following eighteen years.

C. The numerous distinctions between marital and nonmarital children approved by the Court are not substantially related to any legitimate state purpose and, as such, violate the provisions of the Equal Protection Clause of the United States Constitution.

1. Lump-sum child support payments, which have always been prohibited for marital children, are in excess of what is needed to obtain an admission of paternity.

The lump-sum child support payment authorized in chapter 52, Wis. Stats. (1967) was in effect until 1981. Thus, under the court's decision, nonmarital children, now ages six through eighteen, have no right to receive child support from their fathers if the district attorney and/or their mothers entered

into agreements under this statute. There is no equivalent group of marital children.

Although there may have been public policy grounds for permitting lump-sum settlement agreements in those cases where paternity was difficult to prove, there is no public policy which would support the use of lump-sum agreements in those cases where paternity can be proven, or where, as in the present case, the putative father admits paternity. A settlement regarding uncertain paternity stands on a very different footing than does a contractual attempt to compromise or waive parental support obligations. Harry D. Krause, Child Support in America: The Legal Perspective, at 176-77 (1981). In those cases the uncertainty stems from the uncertainty of being able to establish paternity, and

not from uncertainty as to what support is owed the child.

The court described the lump-sum payment alternative as simply another way of paying child support. The actual result, however, is that it is another way of not paying child support. It is this actual result which has led the legislature and courts to prohibit parents from waiving child support rights for marital children. The lump-sum method of payment deprives the trial court of authority to act in the children's best interest.

Distinctions between marital and nonmarital children must be substantially related to permissible state interests. Lalli v. Lalli, 439 U.S. 259, 275-76 (1978). Thus, there must be more than a reactional relationship between the

distinction and the state's legitimate purpose.

Further, the Equal Protection Clause of the United States Constitution requires that a statute placing exceptional burdens on nonmarital children in the furtherance of proper state objectives must be more carefully tuned to alternative considerations and must not reach in excess of its justifiable purposes. Trimble v. Gordon, 430 U.S. 762, 772 (1977).

If the "legitimate state interest" being furthered by the ability to "buy out" of a child support obligation cheaply is the district attorney's ability to obtain an admission of paternity, the questions to ask are, (1) does this alternative accomplish this purpose? and (2) is the reach of this

statute in excess of what is necessary to achieve this purpose?

It can be argued that this "buy out" option may, in some cases, accomplish this purpose. However, there is no evidence in this record to indicate that it was necessary to obtain the admission in this case. Further, the fact that this option was eliminated in 1981 indicates that lump-sum payments are not necessary to obtain paternity admissions.

The more important concern, however, is whether the district attorney's need to plea bargain the issue of paternity justifies a total waiver of future child support, regardless of the child's future needs, the future need for public assistance or the father's ability to pay. The legislatively authorized total waiver of support, which the state court says does not have to be "adequate," is

far in excess of what is necessary to achieve this purpose. As a practical matter, when an admission of paternity is obtained in this manner, the benefits to the child are so minimal, that the admission of paternity has almost no value, except to the county which has its medical costs fully covered.

At least two ironies from this disparate treatment. First, the state's interest in keeping children off of public assistance is totally defeated in the name of the "state's interest." Second, the unmarried father's rights remain fully protected after such an agreement, Stanley v. Illinois, 405 U.S. 645, 658 (1972), while the child has lost all right to require that parent to provide support. Thus, the father may subsequently assert visitation and custody rights and even request support

from the mother who was forced to waive future child support in exchange for an admission of paternity.

Not only does the court's decision create a class of nonmarital children, now ages six through eighteen, who are totally deprived of an ability to receive child support from fathers who have the ability to pay, but it allows the Legislature to create future classes of disadvantaged nonmarital children. It is the state's contention that the sweep of such legislation, which adversely affects only nonmarital children, is without justification.

2. A nonmarital child's inability to commence a separate action for child support following the entry of a lump-sum settlement agreement bears no relationship to any legitimate state interest.

If a marital child had commenced a separate paternity action under sec. 767.02(1)(f), Wis. Stats., under the same circumstances, where no child support had been paid because the mother had waived future support, this action could not have been dismissed.

It is difficult to identify the legitimate state purpose here, since paternity would have already been adjudicated, and since in both marital and nonmarital families, parents would be obligated to provide child support until age eighteen.

D. Denial of future support for non-marital children has far reaching implications for children in Wisconsin and the nation.

As noted earlier, there is not a state in the nation that does not permit prospective modification of support orders. 61 A.L.R.3d at 663. The decision in this case violates this general principle of law which has been held to extend even to those cases involving marital children where the support order was based on an agreement between the parties. Poehnelt v. Poehnelt, 94 Wis. 2d 640, 289 N.W.2d 296 (1980).

The implications of this decision are especially far reaching in light of the fact that fifteen states have adopted the provisions of the Uniform Parentage Act which permits the entry of lump sum

orders in lieu of periodic payments of support. Unif. Parentage Act, § 15(d), 9B U.L.A. 324 (1987). In addition, many states have enacted provisions similarly to the Uniform Parentage Act without adopting the Act itself.

The number of nonmarital children who could potentially be impacted by a decision of foreclosing children subject to such agreements from obtaining future support is significant. According to the U.S. Census Bureau, births to unmarried women increased by almost 60% between 1975 and 1982. During this eight year period, a total of 4.6 million children were born out of wedlock. Ann Nichols-Casebolt, Paternity Adjudication: In the Best Interest of the Out-of-Wedlock Child (1988), citing Annual Statistical Abstract of the United States, U.S. Bureau of the Census, 1986. This number

accounts for almost 20% of all births during the time. Id. at 1.

In Wisconsin alone, birth certificate records indicate that over 14,000 children were born to single women in just twenty-two of Wisconsin's seventy-two counties over the two year period from 1981-1982. Sandra K. Danzinger, Ann Nichols-Casebolt, Child Support for Children Born Outside of Marriage: An Analysis of Paternity Cases, 8 (November 1987). The Court's attention is directed to Amicus App. 1, a table presenting data on the disposition of those births. The data indicates that by 1985 only 9.5% of those children had either been adopted or legitimated, leaving over 90% child support eligible.

If the state court's decision stands, the thousands of nonmarital children whose future support rights were

sold for a few dollars will be relegated to a second class financial status. Those children who have successfully obtained a court review and revision of judgment will have their orders vacated; those with actions pending will have them dismissed.

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CONCLUSION

Based on the arguments presented here, the state urges the Court to grant a writ of certiorari and review the decision of the Wisconsin Supreme Court.

Dated this ___ day of January, 1988.

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APPENDIX

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SECTION 46.25, WISCONSIN STATUTES 2-7

Table 1

Disposition of 1981-82 Births to Unmarried Women by 1985, for Selected Wisconsin Counties

	Total in Group	Percent of all births	Percent of those Potentially Eligible for Child Support
1. Total Births	14,526	100%	--
2. Adoptions	432	3.0	not eligible
3. Legitimations via marriage	353	2.4	not eligible
4. Adoptions or Legitimations[1]	598	4.1	not eligible
Total potentially eligible for child support[2]	13,143	90.5	100%
5. Affidavit of father's name	3,067	21.3	23.5
Paternity adjudications			
6. Birth records	1,870	12.9	14.2
7. Court records[3]	3,320	22.9	25.3
Remainder without Father identified; not eligible for CS by 1985			
8. Birth records	8,186	56.3	62.3
9. Court records[3]	6,735	46.3	51.3

Source: Wisconsin Division of Health, Section of Vital Statistics and court record information.

Section 46.25, Wisconsin Statutes:

(1) There is created a child and spousal support and establishment of paternity and medical liability support program in the department. The purpose of this program is to establish paternity when possible, to enforce support obligations owed by parents to their children and maintenance obligations owed to spouses or former spouses with whom the children reside, to locate persons who are alleged to have taken their child in violation of s. 946.71 or 946.715 or of similar laws in other states, and to locate and value property of any person having a support duty. To accomplish the objectives of this program and of other assistance programs under ch. 49, county and state agencies will cooperate with one another to implement a child and spousal support and paternity establishment program in accordance with state and federal laws, regulations and rules and to assure proper distribution of benefits of all assistance programs authorized under ch. 49.

(2) The department shall constitute the state location service which shall assist in locating parents who have deserted their children and other persons liable for support of dependents or persons who are alleged to have taken their child in violation of s. 946.71 or 946.715 or of similar laws in another state, and in locating and valuing property of any person having a support duty.

(2m) The department may request from any person any information it determines

appropriate and necessary for the administration of this section, ss. 49.19, 49.46 and 49.47 and programs carrying out the purposes of 7 USC 2011 to 2029. Any person in this state shall provide this information within 7 days after receiving a request under this subsection. The department or the county child and spousal support agency may disclose information obtained under this subsection only in the administration of this section, ss. 49.19, 49.46 and 49.47 and programs carrying out the purposes of 7 USC 2011 to 2029.

(3) The department, acting as a state location service, shall furnish all services under sub. (2) to any similarly appointed agency of another state which by its laws is authorized to furnish such services to this state or its agencies.

(4) Except as provided in this section, no person may use or disclose information obtained by the state location service. Any person violating this subsection may be fined not less than $25 nor more than $500 or imprisoned for not more than one year in the county jail or both.

(6) The department shall establish, pursuant to federal and state laws, rules and regulations, a uniform system of fees for services provided under this section to individuals not receiving aid under s. 49.19 or 49.47. The system of fees may take into account an individual's ability to pay. Any fee paid and collected under this subsection may be retained by the county providing the service except for

the fee specified in 42 USC 653 (e) (2) for federal parent locator services.

(7) The department may represent the state or any individual in any action to establish paternity or to establish or enforce a support or maintenance obligation. The department may delegate its authority to represent the state or any individual in any action to establish paternity or to establish or enforce a support or maintenance obligation under this section to the district attorney, or corporation counsel when authorized by county board resolution, pursuant to a contract entered into under s. 59.07 (97). The department shall ensure that any such contract is for an amount reasonable and necessary to assure quality service. The department may, by such a contract, authorize a county to contract with any attorney, collection agency or other person to collect unpaid child support or maintenance. If a county fails to fully implement the programs under s. 59.07 (97), the department may implement them and may contract with any appropriate person to obtain necessary services. The department shall establish a formula for disbursing funds appropriated under s. 20.435 (4) (p) to carry out a contract under this subsection.

(7m) The department may contract with or employ a collection agency, attorney or other person to enforce a support obligation of a parent residing outside this state, or to appear in an action in federal court to enforce such an obligation, or both. To pay for the department's administrative costs of

implementing this subsection, the department may charge a fee to counties, retain up to 50% of any incentive payment made to this state under 42 USC 658 for a collection under this subsection and retain 30% of this state's share of a collection made under this subsection on behalf of a recipient of aid to families with dependent children.

(8) The department may charge counties seeking collection of child and spousal support for any administrative costs it incurs in providing services related to the federal parent locator service under 42 USC 653, the interception of unemployment compensation under 42 USC 654 or the withholding of state and federal income tax refunds under s. 46.255 and 42 USC 664.

(9) The department:

(a) Shall adopt and publish a standard for courts to use in determining a child support obligation based upon a percentage of the gross income and assets of either or both parents.

(b) Shall establish guidelines for courts to consider in determining child support under ss. 767.25 (1m) and 767.51 (5), and shall submit the guidelines to any appropriate standing committee of the legislature for review prior to publication.

(c) Shall develop cost-of-living indices and earnings indices for courts to consider in ordering adjustments in child support under s. 767.33 (1).

(d) May contract with any clerk of court for the department to receive and disburse court-ordered child support payments and to record all such payments and arrearages in payments if the court or clerk of court so requests.

(10)(a) The department shall study the relationship between immediate income withholding and increased collection of child support obligations. With respect to this study, the department may:

1. Enter into written agreements with counties to require the use of immediate income withholding for child support obligations.

2. Evaluate the cost-effectiveness and efficiency of using a percentage-of-income standard to establish a child support obligation.

3. Establish an advisory committee consisting of representatives of various interested organizations, including but not limited to judicial, legal, labor and business organizations.

(b) The department shall submit a report to the presiding officer of each house of the legislature no later than June 30, 1986, on the cost-effectiveness and efficiency of immediate income withholding for child support obligations in the counties with which the department entered into written agreements before July 1, 1984.

(c) The department may expend $22,500 in fiscal year 1985-86 and $22,500 in fiscal year 1986-87 from the

appropriation under s. 20.435 (4) (de) to pay counties for the costs of processing immediate income withholding, pursuant to agreements entered into under par. (a) 1. The department shall develop a plan for allocating those moneys among counties with which the department enters into agreements.

(d) This subsection does not apply after June 30, 1987, or the effective date of the 1987-89 biennial budget act, whichever is later.